

VOL. XII

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

-----  
UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION  
MARK L. KAMHOLZ,

Defendants.  
-----

Proceedings held before the  
  
Honorable William M. Skretny, U.S.  
  
Courthouse, 2 Niagara Circle, Buffalo,  
  
New York on March 14, 2013.

APPEARANCES:

AARON J. MANGO,  
Assistant United States Attorney,  
ROCKY PAIGGIONE, Senior Counsel,  
U.S. Department of Justice,  
Appearing for the United States.

GREGORY F. LINSIN, ESQ.,  
JEANNE M. GRASSO, ESQ.,  
ARIEL S. GLASNER, ESQ.,  
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,  
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal  
Sheila Henderson, Paralegal

Michelle L. McLaughlin, RPR,  
Official Reporter,  
U.S.D.C. W.D.N.Y.  
(716)332-3560

## 1 I N D E X

## 2 WITNESS PAGE

3 PHILIP FLAX  
4 Direct Examination by Mr. Piaggione 2508  
5 Cross-Examination by Mr. Linsin 2581  
6 Redirect Examination by Mr. Piaggion 2636

5

6

7

## 8 GOVERNMENT EXHIBITS EVD.

9 136.01 through 136.11 and  
10 2.02.02 through 2.02.27 2492  
11 108 2534  
12 109 2537

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Jury not present in the courtroom.)

2 THE COURT: Okay. At least we have the  
3 attorneys and parties here. I know the jury is  
4 ready to come in. But there's probably a  
5 preliminary matter or two that we have to address  
6 first.

7 Mr. Linsin, do you want to start?

8 MR. LINSIN: Yes. Thank you, your Honor.  
9 The issue I wanted to raise with the Court, I know  
10 at the close of our time here yesterday, we spoke  
11 about the issue of the jury charge. And I know the  
12 Court has been working on this. One of the issues  
13 that became clearer to me last evening as I was  
14 preparing for the testimony of -- anticipated  
15 testimony of Mr. Flax, who will be a government  
16 RCRA expert, one of the issues relates to a  
17 question that has been posed I think by the  
18 parties' submissions on proposed jury instructions  
19 concerning Counts 18 and 19.

20 And specifically, your Honor, it is this:  
21 That, as the Court may recall, Magistrate Judge  
22 Schroeder had denied the defendants' earlier  
23 dispositive motions with regard to the RCRA counts.  
24 And in his Report and Recommendation and Order, he  
25 had concluded that, in part -- he had based his

1       rationale in part on a conclusion that the  
2       government, in order to establish those violations,  
3       would need to demonstrate and prove an intent to  
4       dispose with respect to the two RCRA disposal  
5       counts. Those are now 18 and 19. At that point it  
6       was 18 and 20.

7       We have proposed that in our submission  
8       concerning the proposed jury charge -- our  
9       document -- I believe it is document 89 that was  
10      filed back in mid-December -- proposed that that  
11      element be included in the charge with respect to  
12      those counts. And as we -- as Mr. Flax testifies  
13      and as we prepare to cross-examine him, it struck  
14      me that that will be a critical issue for us and  
15      for the jury to consider as they evaluate his  
16      testimony.

17      And so I'm raising it now simply to inquire  
18      whether the Court has reached even a preliminary  
19      judgment about that particular element on those two  
20      counts.

21               THE COURT: With respect to intent to  
22      dispose?

23               MR. LINSIN: Yes, sir.

24               MR. MANGO: Your Honor, if I can respond  
25      to that. We've laid out the elements in our

1 proposed jury charges, which is document 77, which  
2 does cite to a Second Circuit case law, Laughlin.  
3 It is very clear in the RCRA statute there is no  
4 element that relates to an intent to dispose.

5 The defendants are trying to inject that  
6 argument into this case clearly to defeat the RCRA  
7 charges, clearly, you know, in the questions that  
8 are being asked of the witnesses that it wasn't  
9 your intent to dispose of this material; it was  
10 your intent to reintroduce it into the coke ovens.  
11 Those questions we objected. The Court let them  
12 in. You know, I guess we'll proceed with those  
13 questioning. But the key is, it is not an element  
14 of the RCRA charge.

15 And we don't as well agree with the  
16 characterization that Magistrate Judge Schroeder's  
17 determination years ago somehow changes the  
18 elements of this RCRA charge, you know, this  
19 settled Second Circuit case law, or, you know,  
20 what -- what elements need to be proved to the  
21 jury. So we are -- we are definitely opposed to  
22 any -- any intent to dispose element being added on  
23 to the RCRA charges.

24 THE COURT: All right. I'll note the  
25 arguments of both parties. I'll have the charge

1 for you by the end of tomorrow, so you'll have it  
2 going into the weekend, and I'll have the verdict  
3 form for you as well. And I'll take another look  
4 at the intent element before I give you the  
5 proposed charge.

6 MR. LINSIN: All right. I would just  
7 mention --

8 THE COURT: Does that work from your  
9 standpoint?

10 MR. LINSIN: Well, we will work with what  
11 we have to. You know, I believe, as I mentioned,  
12 it would be helpful to all sides, all parties, to  
13 have guidance on that before the jury received the  
14 testimony of a RCRA expert who will be testifying  
15 about those Counts, and certainly before we  
16 cross-examine him on those issues. I mean, we will  
17 proceed as the Court directs. But it just  
18 seemed -- as I was thinking through these issues in  
19 preparation for his testimony, it seemed to me to  
20 be a fairly critical issue, and that's why I raised  
21 it this morning.

22 THE COURT: When does Flax testify?

23 MR. PIAGGIONE: He's the next witness.

24 MR. MANGO: He is the next witness. I  
25 would note that in the elements you gave the jury

1 at the start of the case you covered RCRA, and  
2 there was no intent to dispose included, which we  
3 believe is the accurate elements. But I think that  
4 basic providing the elements to the jury was  
5 sufficient at the time. I don't think we need to  
6 re -- go through it again.

7 THE COURT: Well, I'll look at it again.  
8 You know, if -- well, we'll start with the witness.  
9 I can't do anything about that. I'll just examine  
10 it, and if I can -- if I reexamine it and the  
11 decision changes, I will let you know. We'll work  
12 on it a little bit this morning.

13 MR. LINSIN: All right. Thank you, your  
14 Honor. I would just add on that point, with  
15 respect to the decision of Magistrate Judge  
16 Schroeder, it appears to us, given his decision on  
17 that issue -- or his recommendation on that issue  
18 and this Court's adoption of his findings and  
19 recommendation that that determination has become  
20 law of this case for the purposes of analyzing the  
21 elements. And I understand that the government has  
22 cited the Laughlin case. There are a number of  
23 cases, obviously, that we have cited as well on  
24 this issue.

25 But with respect to this case and given the

1 unique issues that were raised in the dispositive  
2 motions, we believe that that is a -- we have  
3 understood it to be a controlling decision from  
4 that point forward, and given that those findings  
5 have been adopted by this Court, we have presumed  
6 that -- and as the Court may remember, immediately  
7 following the preliminary general instructions that  
8 the Court provided to the jury, I raised this point  
9 with the Court on this issue of the intent to  
10 dispose, because it has remained an important issue  
11 for us.

12 THE COURT: Yeah. I don't think Mr. Mango  
13 agrees with you. You wanted to make a comment on  
14 that?

15 MR. MANGO: Yes, your Honor. It's well  
16 settled, the intent element in RCRA is just simply  
17 knowingly -- a knowingly intent element. We do not  
18 believe that Magistrate Judge Schroeder was  
19 intending to add an element to the RCRA charge. In  
20 fact, there was no trial date set. The discussion  
21 in the pretrial motions was more, could the factual  
22 dispute between the parties, which is the facts of  
23 this case, allow Judge Schroeder to issue a Report  
24 and Recommendation dismissing the indictment.  
25 That's what he was focused on.



1           He wasn't focused on what are the elements of  
2 RCRA. He was focused on, can I resolve this  
3 factual dispute, and he said, no, I can't. It  
4 needs to go -- it needs to happen in a trial  
5 setting.

6           MR. LINSIN: And in so doing, your Honor,  
7 he expressly addressed what the government would  
8 need to prove at trial, and I don't have that  
9 opinion in front of me. But that is precisely --  
10 Mr. Mango is correct as to the general aspects of  
11 what was before the magistrate judge then. But in  
12 his findings he did make specific holdings as to  
13 what the government would need to prove in order to  
14 establish these charges, and that is what -- what  
15 we have been referencing.

16           MR. MANGO: But, your Honor, we can't have  
17 law of the case that is contrary to settled Second  
18 Circuit case law, which essentially eviscerates  
19 Count 17 and 18 in this case. It would -- it's --  
20 or sorry, 18 and 19. It would eviscerate those  
21 charges. And it would -- it would not be -- in  
22 reading the language that Congress has used in  
23 passing RCRA, it would be contrary to that as well,  
24 your Honor.

25           THE COURT: Okay. Well, let me take a

1 look at it. But you'll be able to start your  
2 witness, and then we'll go from there, and I'll see  
3 if I can give you a preliminary call on it.

4 MR. LINSIN: Thank you, your Honor.

5 MR. MANGO: Thank you, your Honor.

6 THE COURT: All right. Anything,  
7 Mr. Personius?

8 MR. PERSONIUS: Thank you, no, Judge.

9 THE COURT: Okay. All right. We need a  
10 few minutes just to gather our materials, and I'll  
11 be right back out.

12 (Short recess was taken.)

13 (Jury not present in the courtroom.)

14 THE COURT: Okay. Attorneys and parties  
15 are back present. We will summon the jury in just  
16 a moment. Related to the discussion that we had  
17 just before we broke a couple minutes ago, I had a  
18 chance to review what we did with respect to the  
19 preliminary charge, and, Mr. Mango, I think your  
20 account is accurate.

21 And in the preliminary charge, as you noted, I  
22 did not include the intent element for purposes of  
23 the RCRA counts. Preliminarily I'll give you this  
24 indication. This should be of some guidance to  
25 you. I am going to reaffirm that position that

1       there is not an applicable intent element in the  
2       RCRA counts. I will take another look at it, a  
3       hard look at it, but based on the work that we did  
4       before, that was my determination. And I repeat  
5       that for purposes of giving you some guidance in  
6       terms of your examination of the next government's  
7       witness. If there's any change in that, I will let  
8       you know. But that appears to be the decision that  
9       I will apply in finalizing the jury charge as well.

10               MR. LINSIN: Thank you, your Honor.

11               THE COURT: Okay. Okay. Chris, if you  
12       would bring the jury in please.

13               MR. MANGO: Judge, again, I do have those  
14       two stipulations when we begin before Mr. Flax  
15       testifies.

16               THE COURT: Okay. Is that going to be  
17       related to the photos?

18               MR. MANGO: There are some photos in  
19       there, yes.

20               THE COURT: Okay. And they will be  
21       published as you proceed through?

22               MR. MANGO: Yes. Before I start with the  
23       stipulation -- actually at Mr. Linsin's suggestion,  
24       I'm going to ask that the Court allow the  
25       introduction of these photographs without

1 objection, so we can bring them up.

2 THE COURT: Okay. That would be great and  
3 we can move through it.

4 MR. MANGO: Great.

5 (Jury seated.)

6 THE COURT: Good morning.

7 THE JURY: Good morning.

8 THE COURT: Good to see you again. Have a  
9 seat, please. All right. How's the temperature in  
10 that jury room, a little better? All right.

11 Because I know you have your sweater. Looks like  
12 everyone's added a few layers. All right.

13 We're back convened in Tonawanda Coke and Mark  
14 Kamholz. The attorneys and parties are back  
15 present. We are ready to start.

16 The government has a next witness. But before  
17 that, there is a stipulation or couple of  
18 stipulations that will be presented to you. And as  
19 you know, those are agreements as to what the facts  
20 are, and that becomes, then, competent evidence for  
21 purposes of your consideration in arriving at, you  
22 know, a unanimous verdict resolving all the fact  
23 issues on the 19 counts in this indictment.

24 There's another article in the paper today, so  
25 stay away from anything having to do with this

1 case. It usually comes up, as you probably know,  
2 or maybe I think because I've told you, in the  
3 local news portion of the newspaper. It's a small  
4 article. Again, we don't want you to look at  
5 anything that relates to the evidence that you are  
6 hearing in the courtroom, because you are  
7 restricted to a consideration of all of that  
8 evidence or the lack thereof, not influenced by  
9 anything on the outside other than your common  
10 sense, your experience, and your intelligence in  
11 getting to get this case resolved. Because as we  
12 told you from the outset, important to both sides,  
13 otherwise the case wouldn't be here. And I think  
14 you have a feel for the importance of the case  
15 based on what you've already heard.

16 We urge you to keep your minds open. Don't  
17 prejudge the case. Very important, because the  
18 defense has an opportunity to put a case on. It  
19 may not, but you have to know where you stand with  
20 respect to the evidence before you start getting  
21 into a discussion and deliberations and getting  
22 those fact issues resolved. So, keep your minds  
23 open. Please don't prejudge the case. Stay with  
24 us. You know, sometimes it gets tough to do that,  
25 but -- in my humble opinion. But just keep on

1       working at it. You'll get it. And I know you'll  
2       get those fact issues resolved for us and return  
3       that unanimous verdict.

4             Okay. I think we're still in the government's  
5       case, right? Government has the burden of proof,  
6       and we are going to give you those notebooks today  
7       right, Miss Labuzzetta?

8             THE CLERK: Oh, Judge, sorry. My note's  
9       not big enough.

10            THE COURT: You never know what she's  
11       going to come up when she leaves that room. All  
12       right. We have a new Pope. That's a good start  
13       for today. That's one more issue behind us,  
14       Mr. Linsin.

15            MR. LINSIN: It was probably a unanimous  
16       vote, your Honor.

17            THE COURT: We were here last night until  
18       about 9:15. I think we had some high school  
19       students that were putting on a trial. It was  
20       pretty cool, and Miss Labuzzetta was here, so she's  
21       one step behind her usual quick pace.

22            All right. And these kids did just amazing  
23       work. Kind of makes us wonder why we went to law  
24       school when we see high school students do as well  
25       as they did. Okay. Serious business, right?

1           Let's see what you can do with the  
2 stipulations, Mr. Mango.

3           MR. MANGO: Thank you, your Honor.

4           THE COURT: Okay.

5           MR. MANGO: Your Honor, prior to starting  
6 on the stipulations, the government would move into  
7 evidence Government Exhibits 136.01 through 136.11.  
8 Actually four of those exhibits have already been  
9 introduced into evidence. And then we would move  
10 in the totality as well Government's  
11 Exhibits 2.02.01 all the way to 2.02.27. We would  
12 move those into evidence as they're photographs of  
13 sampling activities that we're going to discuss  
14 now.

15           THE COURT: Okay. They will be moved into  
16 evidence without objection, is that -- that would  
17 be the basis of the stipulation?

18           MR. MANGO: Yes.

19           THE COURT: Okay. Mr. Linsin, so agreed  
20 and stipulated?

21           MR. LINSIN: Mr. Mango as accurately  
22 recited it, your Honor. Yes, no objection.

23           THE COURT: Do you agree with that,  
24 Mr. Personius?

25           MR. PERSONIUS: I do, your Honor.

1 THE COURT: All right. Go for it,  
2 Mr. Mango.

3 (Government's Exhibits 136.01 through  
4 136.11 and 2.02.01 through 2.02.27 were  
5 received into evidence.)

6 MR. MANGO: Thank you, your Honor.  
7 Stipulation. "Testimony of EPA Geologist Robert  
8 Morrell.

9 "The United States of America, by and through  
10 its attorney, William J. Hochul, Jr., United States  
11 Attorney for the Western District of New York and  
12 Ignacia S. Moreno, Assistant Attorney General for  
13 the United States Department of Justice,  
14 Environment and Natural Resources Division, and the  
15 undersigned assistant United States attorney and  
16 senior trial attorney and the undersigned counsel  
17 for defendants Tonawanda Coke Corporation,  
18 Tonawanda Coke, and Mark L. Kamholz do hereby  
19 stipulate angry as follows:

20 "One, that if called to testify, Robert Morrell  
21 would testify that he is a geologist with the  
22 United States EPA, EPA Region 2 Monitoring and  
23 Assessment Branch located in Edison, New Jersey;  
24 that he has been employed with the EPA for the past  
25 25 years; and that as part of his duties, he



1 provides inspection and sampling support for the  
2 Resource Conservation and Recovery Act, RCRA,  
3 program within Region 2 of EPA.

4 "Two, that if called to testify, Robert Morrell  
5 would testify that on two occasions in 2009 he took  
6 samples from the area in and around the two large  
7 deteriorating tanks at Tonawanda Coke that are the  
8 subject of Counts 17 and 18 of the indictment, so  
9 that the samples could be sent to the EPA Region 2  
10 laboratory for analysis for benzene.

11 "Three, that if called to testify, Robert  
12 Morrell would testify that on September 10th  
13 of 2009 he collected eight representative samples  
14 of a material described as sludge from in and  
15 around the westernmost deteriorating tank, also  
16 known as left burnt tank, that is the subject of  
17 Counts 17 and 18 of the indictment; that this  
18 sampling was the result of a request from the civil  
19 EPA Region 2 RCRA Compliance Branch, and that  
20 following the sampling, he delivered the eight  
21 samples to the EPA Region 2 laboratory on  
22 September 14th of 2009.

23 "Four, that if called to testify, Robert  
24 Morrell would testify that the eight samples that  
25 he collected were all taken with a separate sterile

1 plastic scoop to prevent cross-contamination  
2 between the samples, and that the sample ID and  
3 time taken were as follows: Sample 1, Sample ID,  
4 AL05705, 11:30 a.m.;

5 "Sample 2, AL05706, 11:48 a.m.;

6 "Sample 3, AL05707, time collected 12:05 p.m.;

7 "Sample 4, AL05708, 12:10 p.m.;

8 "Sample 5, AL05709, 12:30 p.m.;

9 "Sample 6 AL05710, 12:47 p.m.;

10 "Sample 7, AL05711, 1:10 p.m.;

11 "And Sample 8, AL05712, 1:28 p.m.

12 "Five, that if called to testify, Robert  
13 Morrell would testify that during his sampling  
14 activities on September 10th, 2009, photographs  
15 were taken that fairly and accurately represent the  
16 conditions of the westernmost tank, left burnt  
17 tank, and the easternmost tank, right burn tank;  
18 that Government Exhibits 136.01 to 136.11 are true  
19 and accurate copies of the photographs taken during  
20 the sampling activities, and that the government  
21 exhibit numbers and description are as follows:"

22 And we're going to pull those up on the screen  
23 at this point.

24 "Government Exhibit 136.01, description, view  
25 of the collapsed right burnt tank looking

1 northeast;

2 "136.02, view of the collapsed left burn tank  
3 looking northwest;

4 "136.03, sample location for left burn tank  
5 number one;

6 "136.04, sample location for left burn tank  
7 number two;

8 "136.05, sample location for left burn tank  
9 number three and left burn tank number four;

10 "136.06, sample location for left burn tank  
11 number five.

12 "136.07, sample location for lowest burn tank  
13 number six;

14 "136.08, sample location for left burn tank  
15 number seven;

16 "136.09, sample location for left burn tank  
17 number eight;

18 "136.10, view inside the left burn tank;

19 "And 136.11, view inside the right burn tank."

20 Paragraph 6. "That if called to testify,  
21 Robert Morrell would testify that on  
22 December 17th, 2009, he collected 18 representative  
23 samples of a material described as sludge from in  
24 and around the deteriorating tanks that are the  
25 subject of Counts 17 and 18 of the indictment; that

1       this sampling occurred during the execution of a  
2       criminal search warrant at Tonawanda Coke; and that  
3       following the sampling, he delivered the 18 samples  
4       to the EPA Region 2 laboratory on December 18th,  
5       2009.

6       "Seven, that if called to testify, Robert  
7       Morrell would testify that the 18 samples he  
8       collected were all taken with a separate sterile  
9       plastic scoop to prevent cross-contamination  
10      between the samples and that the sample ID, time  
11      taken were as follows:

12       "Sample 1, sample ID AL07170, time collected  
13      10:40 a.m.;

14       "Sample 2, AL07171, 10:55 a.m.;

15       "Sample 3, AL07172, 10:56 a.m.;

16       "Sample 4, AL07173, 11:05 a.m.;

17       "Sample 5, AL07174, 11:20 a.m.;

18       "Sample 6, AL07175, 11:35 a.m.;

19       "Sample 7, AL07176, 11:50 a.m.;

20       "Sample 8, AL07177, 12:05 p.m.;

21       "Sample 9, AL07178, 12:15 p.m.;

22       "Sample 10, AL07179, 3:00 p.m.;

23       "Sample 11, AL07180, 3:10 p.m.;

24       "Sample 12, AL07181, 3:15 p.m.;

25       "Sample 13, AL07182, 3:22 p.m.;

1 "Sample 14, AL01783, 3:35 p.m.;

2 "Sample 15, AL07184, 4:15 p.m.;

3 "Sample 16, AL71785, 4:23 p.m.;

4 "Sample 17, AL07186, 4:30 p.m., and

5 "Sample 18, AL07187, 4:40 p.m.

6 "Eight. If called to testify, Robert Morrell  
7 would testify that during his sampling activities  
8 on December 17th, 2009, photographs were taken that  
9 fairly and accurately represent the conditions of  
10 the westernmost tank and the easternmost tank; that  
11 Government Exhibits 2.02.01 to 2.02.27 are true and  
12 accurate copies of the photographs taken during his  
13 sampling activities; and that the Government  
14 Exhibit numbers and description are as follows:"  
15 We'll pull these up on the screen.

16 "Government Exhibit 2.02.01, photograph taken  
17 on December 17th, 2009, facing north, tank on east;

18 "2.02.02, photograph taken on December  
19 17, 2009, facing north, tank on east;

20 "2.02.03, photograph taken on December 17th,  
21 '09, facing north, tank on west;

22 "2.02.04, photograph taken on  
23 December 17th, 2009, facing north, tank on west;

24 "2.02.05, photograph -- photo taken on  
25 December 17th, 2009, outside tank to the west;

1 "2.02.06, photo taken on December 17th, 2009,  
2 tank to the east;

3 "2.02.07, photo taken on December 17th, 2009,  
4 tank to the west.

5 "2.02.08, photo taken on December 17th, 2009,  
6 sample 1.

7 "2.02.09, sample 2 and 3.

8 "2.02.10, sample 4;

9 "2.02.11, sample 5;

10 "2.02.12, sample 6;

11 "2.02.13, sample 7;

12 "2.02.14, sample 8;

13 "2.02.15, sample 9;

14 "2.02.16 sample 10;

15 "2.02.17 sample 11;

16 "2.02.18, sample 12;

17 "2.02.19, sample 13;

18 "2.02.20, sample 14;

19 "2.02.20, sample 14". Thank you, Lauren.

20 "2.02.21, up close of sampled material in  
21 sample 14;

22 "2.02.22, sample 15;

23 "2.02.23, sample 15;

24 "2.02.24, sample 16;

25 "2.02.25, sample 16;

1 2.02.26, sample 17;

2 "And 2.02.27, sample 18.

3 "Nine, the government -- that Government  
4 Exhibits 136.01 to 136.11 and 2.02.01 to 2.02.27  
5 are admissible at trial without further proof or  
6 foundation."

7 And this stipulation is dated March 12th of  
8 2013. It's signed by myself, by Mr. Piaggione, by  
9 Mr. Linsin, by Miss Grasso, by Mr. Personius, and  
10 Mr. Kamholz.

11 And, your Honor, I'd ask that this stipulation  
12 be so received.

13 THE COURT: Okay. It will be received.  
14 Is it marked as a Court Exhibit?

15 MR. MANGO: Yes, your Honor, Court  
16 Exhibit 5.

17 THE COURT: Okay. It will be received as  
18 a Court Exhibit. The information contained in that  
19 stipulation, ladies and gentlemen, is for your  
20 consideration. It is competent evidence. It is  
21 the result of the agreement of the parties.

22 In addition to that, there was some reference  
23 to a witness who would be called to testify. You  
24 are to view that part of the stipulation as if that  
25 witness were here telling you that information that

1 was contained in the stipulation. That's competent  
2 evidence for your consideration.

3 Okay. I think we can move forward. So  
4 stipulated, Mr. Linsin?

5 MR. LINSIN: Yes, your Honor, thank you.

6 THE COURT: Mr. Personius?

7 MR. PERSONIUS: Yes, your Honor.

8 THE COURT: Okay. And Mr. Mango?

9 MR. MANGO: Yes, your Honor, thank you.

10 THE COURT: You're welcome.

11 MR. MANGO: One more.

12 THE COURT: One more?

13 MR. MANGO: One more.

14 THE COURT: Mr. Mango. All right. Go  
15 ahead.

16 MR. MANGO: Thank you. Your Honor, I'm  
17 going to read from what's identified as Court  
18 Exhibit 6. "Stipulation. "Testimony of EPA  
19 Chemist John Lee.

20 "The United States of America, by and through  
21 its attorney, William J. Hochul, Jr., United States  
22 Attorney for the Western District of New York, and  
23 Ignacia S. Moreno, Assistant Attorney General for  
24 the United States Department of Justice,  
25 Environment and Natural Resources Division, and the



1 undersigned assistant United States attorney, and  
2 senior trial attorney, and the undersigned counsel  
3 for defendants, Tonawanda Coke Corporation,  
4 Tonawanda Coke, and Mark L. Kamholz do hereby  
5 stipulate and agree as follows:

6 "One, that if called to testify, John Lee,  
7 chemist with the laboratory branch of the United  
8 States Environmental Protection Agency, EPA, Region  
9 2, Division of Environmental Science and  
10 Assessment, located in Edison, New Jersey, Region 2  
11 laboratory, would testify that he has been employed  
12 as a chemist with EPA since August 1983, and that  
13 the Region 2 laboratory is responsible for the  
14 chemical, microbiological, and biological testing  
15 of pollutants in support of all environmental  
16 statutes under the jurisdiction of the EPA,  
17 including the Resource Conservation and Recovery  
18 Act, RCRA.

19 "Two, that if called to testify, John Lee would  
20 testify that eight jars collected by EPA employees  
21 from in and around the two large deteriorating  
22 tanks at Tonawanda Coke and containing a material  
23 described as sludge was delivered to the Region 2  
24 laboratory on September 14th, 2009. And that 18  
25 jars collected by EPA employees from in and around

1 the two large deteriorating tanks at Tonawanda  
2 Coke, and containing a material described as sludge  
3 was delivered to the Region 2 laboratory on  
4 December 18th, 2009.

5 "Three, that if called to testify, John Lee  
6 would testify that for the samples described in  
7 paragraph 2, he performed the toxicity  
8 characteristic leaching procedure, TCLP, test  
9 method 1311, as required by Title 40, Code of  
10 Federal Regulations, Part 261.24 of the RCRA  
11 regulations to create leacheates, i.e., extracts  
12 which are non-potable water, that he has performed  
13 the TCLP procedure over 200 times, and that the  
14 TCLP is a procedure designed to simulate the  
15 effects of slightly acidic rain water when it comes  
16 into contact with material in a landfill and  
17 produces a leachate.

18 "Four, that if called to testify, John Lee  
19 would testify that for the samples described in  
20 paragraph 2, he analyzed representative sub-samples  
21 of the TCLP extracts to determine whether and in  
22 what concentration volatile organic compounds were  
23 present using accredited EPA Method 624 for  
24 non-potable samples that is documented in the  
25 Region 2 laboratory standard operating procedure,

1 SOP C-89, Analysis of Volatile Organic Compounds in  
2 Aqueous and Waste Oil/Waste Organic Solvent Samples  
3 by Purge and Trap, GC/MS, and that he has performed  
4 this analytical method on non-potable samples over  
5 a thousand times.

6 "Five, that if called to testify, John Lee  
7 would testify that the concentration of benzene, a  
8 volatile organic compound, in the eight samples  
9 delivered to the Region 2 laboratory on  
10 September 14, 2009, as measured using gas  
11 chromatography/mass spectrometry, GC/MS, in  
12 accordance with accredited EPA Method 624 was as  
13 follows:

14 "Sample 1, sample ID AL05705, analytical result  
15 for benzene, milligrams over liter, 3.9; regulatory  
16 level for benzene, milligrams over liter, 0.5;

17 "Two, sample 2, AL05706, result for benzene,  
18 1.7;

19 "Sample 3, AL05707, result for benzene 1.4;

20 "Sample 4, AL05708, result for benzene 1.1;

21 "Sample 5, AL05709, result for benzene, 0.64;

22 "Sample 6, AL05710, result for benzene, 2.1;

23 "Sample 7, AL05711, result for benzene, 14;

24 "Sample 8, AL05712, result for benzene 3.0.

25 "Six, that if called to testify, John Lee would

1       testify that the concentration of benzene, a  
2       volatile organic compound, in the 18 samples  
3       delivered to the Region 2 laboratory on  
4       December 18th, 2009, as measured using GC/MS in  
5       accordance with accredited Method 624 was as  
6       follows:

7               "Sample number, 1, ID, AL07170. Result for  
8       benzene, non detect. Regulatory level for benzene,  
9       0.5;

10              "Sample 2, AL07171, result for benzene, non  
11       detect;

12              "Sample 3, AL07172, result for benzene, non  
13       detect;

14              "Sample 4, AL07173, result for benzene, 8.5;

15              "Sample 5, AL07174, result for benzene 6.5;

16              "Sample 6, AL07175, result for benzene, 0.81;

17              "Sample 7, AL07176, result for benzene, non  
18       detect;

19              "8, AL078177, result for benzene 2.9;

20              "Sample 9, AL07178, result for benzene, non  
21       detect;

22              "Sample 10, AL07179, result for benzene 9.8;

23              "Sample 11, AL07180, result for benzene, 3.7;

24              "Sample 12, AL07181, result for benzene 5.8;

25              "Sample 13, AL07182, result for benzene, 3.6;

1 "Sample 14, AL07183, non detect, result for  
2 benzene;

3 "Sample 15, AL07184, result for benzene, 3.4;

4 "Sample 16, AL07185, result for benzene, 1.9.

5 "Sample 17, AL07186, result for benzene, 0.80.

6 "Sample 18, AL07187, result for benzene, 2.6.

7 "Seven, that the analytical results contained  
8 in paragraph 5 and paragraph 6 are admissible at  
9 trial without further proof or foundation."

10 And this is also dated March 12th, 2013.

11 Signed by myself, by Mr. Piaggione, by Mr. Linsin,  
12 Miss Grasso, Mr. Personius, and Mr. Kamholz.

13 And, your Honor, I ask that this Court Exhibit  
14 number 6 be received into evidence.

15 THE COURT: Okay. And today's March 14th.

16 MR. MANGO: It is.

17 THE COURT: So that was signed and  
18 subscribed two days ago.

19 MR. MANGO: That's correct, your Honor.

20 THE COURT: Okay. It will be received as  
21 Court Exhibit 6. The information contained therein  
22 so stipulated, Mr. Linsin?

23 MR. LINSIN: So stipulated, your Honor.

24 THE COURT: Mr. Personius?

25 MR. PERSONIUS: Yes, your Honor.

1 THE COURT: Okay. And Mr. Mango, correct?

2 MR. MANGO: Yes, your Honor, so  
3 stipulated.

4 THE COURT: If you would give that to  
5 Miss Labuzzetta, please.

6 Ladies and gentlemen, the same instruction,  
7 that is all, should you choose to consider it  
8 competent evidence to help you and assist you in  
9 assessment of whether the government's evidence  
10 meets the standard of proof beyond a reasonable  
11 doubt.

12 There were witnesses referenced in the  
13 stipulation. They are to be considered as if they  
14 were here personally testifying to you for the  
15 information that was contained in the stipulation  
16 that is competent evidence. Okay.

17 Now, Mr. Piaggione?

18 MR. PIAGGIONE: Yes, your Honor. Our next  
19 witness will be Philip Flax, F-L-A-X.

20 THE COURT: Okay. Lets find out if it is.  
21 Stay right there, please, and I'll have you sworn  
22 as a witness.

23 P H I L I P F L A X, having been duly sworn as a  
24 witness, testified as follows:

25 THE COURT: Okay. Please be careful.

1 Just take it easy, get a seat, get comfortable. I  
2 think you have the microphone positioned just about  
3 right. And we ask you to respond in the direction  
4 of the jury because you're here to testify for  
5 their benefit.

6 THE WITNESS: Yes, your Honor.

7 THE COURT: Couple of very preliminary  
8 questions -- or instructions, I'm sorry. If you  
9 don't understand a question, ask that it be  
10 repeated. Don't try to answer a question you're  
11 not sure about. Be as concise with your answers as  
12 you can. Don't volunteer information. That's  
13 generally what complicates things if we want to  
14 move through this expeditiously. If you can answer  
15 a question with a yes or no, and that's what the  
16 question calls for, please try to do that. It's up  
17 to the attorneys to draw out the information after  
18 that that they want from you. If there's an  
19 objection, and there likely will be some, wait  
20 until I rule on the objection, then I will give you  
21 instructions, if it's unclear, as to what to do,  
22 complete an answer, wait for the next question, or  
23 something along those lines. Do you understand?

24 THE WITNESS: Yes, sir. Yes, your Honor.

25 THE COURT: Okay. I think you're going to

1 carry okay. Speak at the microphone -- it's  
2 friendly -- in a conversational tone. Tell us what  
3 your full name is and spell your last name, please.

4 THE WITNESS: My name is Philip Flax.  
5 Last name is spelled F-L-A-X.

6 THE COURT: Okay, great. Thank you very  
7 much.

8 Mr. Piaggione your witness.

9 MR. PIAGGIONE: Thank you, your Honor.

10 DIRECT EXAMINATION BY MR. PIAGGIONE:

11 Q. Mr. Flax, what is your educational background?

12 A. I have a bachelor's degree in geoscience from  
13 New Jersey City University, and a master's degree  
14 in geology from Queens College at the City  
15 University of New York.

16 Q. And what did you do after you completed  
17 graduate school?

18 A. After I completed graduate school, I was  
19 working for the U.S. Army Corps of Engineers in the  
20 New York City district. I worked doing wetlands  
21 delineation, support for dredging projects, and I  
22 worked on beach erosion control and shore  
23 protection projects.

24 Q. Okay. After that position, what did you do  
25 next?



1 A. In February of 1989 I was hired by the  
2 Environmental Protection Agency as a Corrective  
3 Action Project Manager in the RCRA program.

4 Q. And how long did you stay in that position?

5 A. I was in that position for approximately two  
6 and a half years, a little more than that, from  
7 February of 1989 to October of 1991.

8 Q. And what were your duties in that position?

9 A. During that time I had several duties. Primary  
10 duty was to oversee remediation of contamination in  
11 industrial sites that are regulated by EPA. The  
12 other function was to serve as a RCRA inspector to  
13 inspect facilities to determine their compliance  
14 with the regulations.

15 Q. And what did you do after that position?

16 A. In October of 1991 we had an internal  
17 reorganization within EPA. A new section within  
18 the branch I worked was created, and I was made the  
19 manager of that section.

20 Q. And what were your duties then?

21 A. My duties were oversee a staff of engineers and  
22 scientists in performance of compliance and  
23 inspections, and outreach to the regulated  
24 community, and to basically respond to requests  
25 from the communities, to give presentations to help

1       them better understand how facilities within those  
2       communities were regulated.

3       Q.   How long did you stay in that position?

4       A.   I was in that position until July of 1996 when  
5       we had another internal reorganization.

6       Q.   And what happened then?

7       A.   At that time I was made the RCRA Senior  
8       Enforcement Team Leader, and with pretty much the  
9       same responsibilities I had previously.

10      Q.   And what were your duties in that position?

11      A.   Oversee a staff of engineers in their  
12      performance of compliance evaluations at industrial  
13      facilities to determine their compliance with the  
14      RCRA regulations.

15      Q.   Okay.  How long did you stay in that position?

16      A.   I stayed in that position until February  
17      of 2012.

18      Q.   Okay.  And what happened then?

19      A.   In February of 2012 I was asked by regional  
20      management to take a reassignment to a position to  
21      oversee RCRA corrective action, remediation being  
22      undertaken in the region.

23      Q.   Now you.  While you were employed -- while you  
24      are employed with EPA, have you received training  
25      regarding those positions that you've described?

1 A. Yes. We received a lot of training in the  
2 years. The patent transport of chemicals in the  
3 environment, hydrology, remediation techniques,  
4 treatment technologies for hazardous waste, RCRA  
5 inspector training, basic inspector training,  
6 advanced RCRA inspector training, RCRA inspector  
7 institute where we obtained a specialist given at  
8 our national enforcement investigation center in  
9 Denver, Colorado. And just very, very many courses  
10 over the years and specialized units within RCRA  
11 such as incinerators, service impoundments.

12 THE COURT: Mr. Flax, just move the  
13 microphone back a little bit. Thank you.

14 BY MR. PIAGGIONE:

15 Q. Now, in the course of your duties, did you ever  
16 conduct RCRA inspections yourself?

17 A. Yes, I did. When I initially came to work I  
18 conducted inspections from that time until I became  
19 a manager in October '91. I conducted somewhere  
20 between 50 and 60 inspections.

21 Q. Okay. What is typically involved in a RCRA  
22 inspection for compliance?

23 A. Well, a thorough inspection will start before  
24 the inspector actually goes out to the facility.  
25 They'll review previous inspection reports.

1 They'll review whatever information is available  
2 regarding that company or companies that operate in  
3 that industrial sector, so they can determine what  
4 their industrial processes do and what wastes they  
5 may try to produce; previous inspection reports  
6 from state and EAP. They would look at their past  
7 compliance history to get a sense of what they  
8 might find when they go out there. And if that  
9 facility is subject to RCRA permitting, they would  
10 review that permit because that is what is  
11 enforceable under RCRA. And all this, of course,  
12 is contingent on the inspector having enough time  
13 to do all that.

14 Q. Okay. And did your inspections involve making  
15 a hazardous waste determination?

16 A. Yes, they did.

17 Q. And what does that involve?

18 A. Number one, it's incumbent upon a generator of  
19 hazardous waste -- and a generator of hazardous  
20 waste under RCRA is one who produces hazardous  
21 waste.

22 Q. Excuse me, just answer my question please. Did  
23 you make determinations regarding hazardous waste?

24 A. Yes, I did.

25 Q. Okay. Can you tell us what does that involve

1 as a RCRA inspector?

2 A. First it involves determining whether or not  
3 the waste is specifically excluded or exempted by  
4 regulation. Then you go to regulations and you  
5 determine whether that waste is listed. In the  
6 regulations there are numerous wastes that, when  
7 they are always produced, no matter what the  
8 concentrations of contaminants in those wastes,  
9 those wastes are hazardous under RCRA.

10 In the absence of a waste being listed, then  
11 you can determine by testing whether a waste is  
12 hazardous. And there are four ways, we call them  
13 characteristic wastes. The first characteristic  
14 waste is one that we call an ignitable waste. An  
15 ignitable waste is one that has a flash point of  
16 140 degrees Fahrenheit or less.

17 The second is a corrosive hazardous waste.  
18 These are generally strong acids and bases. These  
19 are materials that have a pH of 2 or less or  
20 greater than 12.5.

21 The third is a reactive hazardous waste.  
22 Reactive hazardous waste are those that react  
23 violently in water or air, are readily explosive,  
24 or generally produce large amounts of sulfide or  
25 cyanide gases.

1           And the fourth type of waste is a toxicity  
2           characteristic waste. Toxicity characteristic  
3           wastes are 40 compounds. If any one of them in a  
4           material exceeds a stipulated regulatory standard  
5           in the regulation, then that material is a  
6           hazardous waste. This includes things such as  
7           benzene. Things such as trichloroethylene and  
8           tetrachlorethylene, otherwise known as dry cleaning  
9           fluids, strong solvents, pesticides such as  
10          chlordan and lindane.

11           THE COURT: Slow down just a little bit,  
12          please.

13           THE WITNESS: Sorry, your Honor. And  
14          metals such as lead, arsenic, cadmium, chromium.

15          BY MR. PIAGGIONE:

16          Q. Okay. What else have you spent your  
17          professional time on?

18          A. Excuse me?

19          Q. Have you participated as an EPA faculty  
20          member --

21          A. Yes.

22          Q. -- for RCRA training?

23          A. Yes. Yes, I have. I've given courses in both  
24          basic inspector training and RCRA inspector  
25          training.

1 Q. And can you tell us what courses -- how many  
2 inspectors have you trained by teaching these  
3 courses?

4 A. A couple hundred.

5 Q. Okay. And have you ever testified in court as  
6 a RCRA expert before?

7 A. Yes, I have. I've testified twice in court.  
8 First in the Northern District of New York in the  
9 case of M & M Enterprises and Mahendra Patel and  
10 in 2003 in the District of Puerto Rico in the case  
11 of J and G Corporation.

12 Q. Okay. And in the course of your duties as a  
13 RCRA supervisor, how many RCRA inspections have you  
14 reviewed to determine compliance with RCRA and RCRA  
15 permits?

16 A. More than 500.

17 Q. And as part of your duties, have you been  
18 involved in compliance and enforcement of RCRA  
19 regulations regarding the recycling of hazardous  
20 waste?

21 A. Yes, I have.

22 Q. And as part of your duties, have you written  
23 regulatory interpretations for industry?

24 A. Yes, I have.

25 Q. What about EPA practices and policies?

1 A. I've reviewed EPA practices and policies quite  
2 often to determine what the agency's intent for  
3 regulations when there is any ambiguity.

4 Q. As part of your experience in training as a  
5 manager, do you provide guidance to federal EPA  
6 RCRA inspectors regarding EPA practices and  
7 policies?

8 A. On a routine basis.

9 Q. And as part of your duties, have you had to  
10 review laboratory analysis of samples and compare  
11 them to the RCRA definition of hazardous waste to  
12 determine if RCRA applies?

13 A. Yes, I have.

14 Q. And how many times have you done that?

15 A. Over a hundred times.

16 MR. PIAGGIONE: At this point, your Honor,  
17 based on Mr. Flax's experience in the field of RCRA  
18 for the past 24 years, his education, his  
19 continuing education in the field of RCRA, and his  
20 knowledge of the RCRA statute, and its implementing  
21 regulations and definitions, I offer Mr. Flax as an  
22 expert witness in the field of RCRA, its  
23 implementing regulations, definitions, and  
24 permitting program and EPA practices and guidances  
25 regarding the implementation of RCRA.



1 THE COURT: Okay. Any objection,  
2 Mr. Linsin?

3 MR. LINSIN: No objection, your Honor.  
4 Thank you.

5 THE COURT: Mr. Personius?

6 MR. PERSONIUS: No, your Honor.

7 THE COURT: Okay. So, ladies and  
8 gentlemen, Mr. Flax will be tendered to you as an  
9 expert. Now remember, you judge his credibility  
10 the same way you do every other witness, those same  
11 factors apply.

12 It's agreed that he has a special expertise in  
13 RCRA and the application of the RCRA statute. And  
14 you heard his background and training. That can  
15 assist you in assessing the value and weight, if  
16 any, that you choose to give to his testimony. But  
17 again, he's no different from any other witness  
18 other than his expertise will be utilizable in  
19 explaining and presenting to you the evidence in  
20 this case.

21 Okay. Mr. Piaggione, you may proceed.

22 MR. PIAGGIONE: Thank you, your Honor.

23 BY MR. PIAGGIONE:

24 Q. What activities does RCRA address?

25 A. RCRA addresses the cradle-to-grave management

1 of hazardous waste.

2 Q. Can you explain what cradle-to-grave means?

3 A. Cradle-to-grave means from the point that a  
4 waste is first produced or generated, right through  
5 you until its final deposition in disposal.

6 Q. Based upon your training and experience, how  
7 does the EPA ensure compliance with RCRA?

8 A. We do that several ways. We issue information  
9 requests to facilities, where we ask detailed  
10 questions about their practices. We perform  
11 compliance inspections. And we issue permits to  
12 facilities that require them, and we enforce those  
13 permits.

14 Q. If you could just try to slow down a little  
15 bit.

16 A. Certainly. Sorry.

17 Q. That's okay. Does the EPA require RCRA permits  
18 for all activities?

19 A. No, it does not.

20 Q. What activities does RCRA permits -- what  
21 activities require RCRA permits?

22 A. RCRA permits are required for certain storage,  
23 treatment, and disposal activities.

24 Q. Okay. Does the state government have RCRA  
25 programs as well?

1 A. Yes.

2 Q. Okay. Can you explain how the state RCRA  
3 programs fit into the federal regulatory programs?

4 A. We have a work sharing relationship. Like the  
5 state of New York, it has an authorized program.  
6 That means that the state of New York has  
7 demonstrated to us -- this happened many years  
8 ago -- that they have regulations that are at least  
9 equivalent to the federal regulations, and that  
10 they have personnel sufficient to implement the  
11 program.

12 What we do, we develop annual work plans that  
13 are cooperative agreements between us and the  
14 state, and divides up the different types of  
15 permits we'll issue, the corrective action  
16 facilities that would be overseen, and the  
17 different facilities that would be inspected by the  
18 state and by EPA. We have a cooperative work  
19 sharing relationship.

20 Q. And as part of your duties, have you provided  
21 oversight of state RCRA programs?

22 A. Yes, I have.

23 Q. Which states?

24 A. State of New York, State of New Jersey, and the  
25 Commonwealth of Puerto Rico.

1 Q. How does New York State Department of  
2 Environmental Conservation and federal EPA work  
3 together regarding permitting and inspections?

4 A. We have constant meetings where we develop work  
5 plans to discuss progress in implementing those  
6 work plans and divide up the work.

7 Q. And was that true between the periods of 2005  
8 and 2009?

9 A. Yes, it was.

10 Q. As part of your duties, did you provide  
11 guidance to the EPA inspectors you supervised?

12 A. Routinely.

13 Q. Okay. And as part of your duties, did you  
14 provide oversight of the state programs?

15 A. Yes.

16 Q. And how did you do that?

17 A. Several times a year we would go up to Albany,  
18 and we would review the files of New York State to  
19 ensure the inspections they were conducting were  
20 proper; that if violations were found, that they  
21 were properly documented; and that timely and  
22 appropriate enforcement action was being taken when  
23 that was necessary.

24 Q. Now, when you said you provide guidance to the  
25 EPA inspectors you supervise, that does not include

1 New York State inspectors, is that right?

2 A. That is correct.

3 Q. Now, does your guidance to the EPA inspectors  
4 include what they should do if they suspect a  
5 violation of RCRA?

6 A. Yes, it does.

7 Q. And what is the guidance you provide?

8 A. EPA inspectors are instructed not to inform the  
9 facility during an inspection that violations have  
10 occurred. And it's done for several reasons.  
11 Number one, quite often an inspector does not get a  
12 chance to review whether there are more significant  
13 violation of the facility.

14 THE COURT: Stop right there. This goes  
15 beyond the scope of that question. So break it  
16 down a little bit.

17 MR. PIAGGIONE: Okay. Sorry, your Honor.

18 BY MR. PIAGGIONE:

19 Q. With respect to when an EPA inspector suspects  
20 a violation of RCRA, do you give them guidance as  
21 what to do at the conclusion of that inspection?

22 A. Yes. To inform the supervisors that they  
23 believe there's a violation.

24 Q. Okay. Say that again.

25 A. To inform their supervisors that they believe

1       there is a violation.

2       Q.   Okay.  Are they instructed to inform the  
3       company?

4       A.   No.

5       Q.   Okay.  And when they inform their supervisors,  
6       you're referring to the RCRA supervisors in the  
7       EPA, is that correct?

8       A.   Correct.

9       Q.   Okay.  And at that time what is -- why is that  
10      required?

11      A.   Number one, I would want to review their  
12      inspection reports to ensure that their  
13      observations and the facts gathered during the  
14      inspection truly supports the violations that they  
15      believe have occurred.

16      Q.   Okay.  And does the EPA RCRA program have a  
17      procedure when a violation of RCRA is suspected?

18      A.   Generally what we would do when a violation --

19      Q.   Could you just answer that yes or no?

20      A.   I'm sorry, yes.

21      Q.   And what is that procedure?

22      A.   We will issue an information request letter  
23      under RCRA.

24      Q.   What else do they do?  What else would you do?

25      A.   I would review all the inspection reports to

1       ensure that they support the contention that there  
2       are violations.

3       Q.   Would you require them to take samples?

4       A.   On occasion, yes.

5       Q.   And based upon your position and your knowledge  
6       of the EPA RCRA practices, is there a process that  
7       EPA follows to determine if a RCRA violation has  
8       occurred?

9       A.   We would take the information that the  
10       inspector has gathered during the inspection  
11       report, the information that we get from the  
12       response to the information request, we would  
13       review the regulations, because -- to ensure that  
14       there were no specific exemptions or exclusions  
15       carved out in the regulations that we may not be  
16       aware of that may negate the potential violation.

17       Q.   Okay.  And is that reviewed -- that  
18       determination -- do you make that determination?

19       A.   Yes.

20       Q.   Okay.  And is that determination reviewed by  
21       anyone else?

22       A.   Generally reviewed by the branch chief, but  
23       it's generally reviewed just before we issue an  
24       enforcement action.

25       Q.   Does counsel get involved in that decision?

1 A. Yes, they do.

2 Q. How do they get involved?

3 A. They review the inspection reports. They  
4 review the responses to the information request  
5 letter, and they review our enforcement actions.

6 Q. Okay. Does the EPA have a name for a company  
7 that produces hazardous wastes?

8 A. Yes. We call them generators.

9 Q. And do -- and does RCRA regulations define what  
10 a generator must do?

11 A. Well, yes, it does. They define specifically  
12 what generators of different categories must do.  
13 There are three categories of generators.

14 Q. Does RCRA define what a hazardous waste is?

15 A. Yes, it does.

16 Q. How does a generator determine if it produces a  
17 hazardous waste?

18 A. It's the generator's responsibility, and they  
19 must be familiar with the regulations to determine  
20 whether or not they generate a hazardous waste.

21 Because, as we said before, there are listed  
22 hazardous wastes in the regulations that are always  
23 hazardous, no matter what the concentrations of  
24 different contaminants are. Then they got to  
25 determine if their waste is characteristic or if



1 it's subject to an exclusion.

2 Q. Okay. Now you mentioned --

3 MR. LINSIN: I'm sorry, your Honor. I  
4 didn't hear that final -- the end of that last  
5 response.

6 THE COURT: Subject to an exclusion.

7 THE WITNESS: Subject to an exclusion.

8 MR. LINSIN: Thank you.

9 BY MR. PIAGGIONE:

10 Q. And what is a characteristic hazardous waste  
11 again?

12 A. Characteristic waste is one that either fails  
13 for ignitability, corrosivity, reactivity, or is  
14 one of the 40 constituents that makes it toxicity  
15 characteristic.

16 Q. Okay. In the RCRA regulations, does it  
17 describe what a material must be subject to  
18 regarding toxicity? What test should be --

19 A. Yes. There's a test called the toxicity  
20 characteristic leaching procedure. And this test  
21 basically simulates what the concentration of a  
22 waste would be in the leachate. The leachate is an  
23 extract once precipitation works its way down  
24 through a landfill.

25 Q. Are you familiar with the regulatory levels for

1 toxicity characteristic constituents?

2 A. Some more than others. There are 40 of them.

3 Q. Is benzene on that list?

4 A. Yes, it is.

5 Q. And what is the RCRA regulatory standard for  
6 benzene?

7 A. The RCRA regulatory standard for benzene is 0.5  
8 milligrams per liter.

9 MR. PIAGGIONE: Your Honor, I would like  
10 to show this witness Court Exhibit number 6. May I  
11 approach?

12 THE COURT: You may.

13 MR. PIAGGIONE: Let me know when you're  
14 finished looking at that.

15 MR. PERSONIUS: Your Honor, I'm sorry for  
16 being confused. What is the witness looking at?

17 THE COURT: That's the stipulation.

18 MR. PERSONIUS: Oh, okay.

19 THE COURT: Court Exhibit 6.

20 MR. PERSONIUS: Okay.

21 THE COURT: That's the second stipulation  
22 that was presented by Mr. Mango.

23 MR. PERSONIUS: Thank you, Judge.

24 THE COURT: You're welcome.

25 MR. PIAGGIONE: Thank you for clarifying,

1       your Honor.

2                   THE WITNESS: I've looked at it.

3 BY MR. PIAGGIONE:

4       Q. Okay. And reviewing the results -- the  
5       laboratory results of the samples taken in  
6       September of '09, of 2009, how many sample results  
7       are there?

8       A. There are eight sample results.

9       Q. And in your opinion as an expert on RCRA  
10      definitions, how many of them indicate they fall --  
11      or rather they exceed the regulatory level for  
12      benzene?

13      A. All eight of them do.

14      Q. So they would indicate they were  
15      characteristically hazardous for toxicity?

16      A. That's correct.

17      Q. Okay. And are there laboratory results for  
18      samples taken in December of 2009?

19      A. Yes, there are.

20      Q. And how many sample results are there?

21      A. There are 18 samples.

22      Q. And in your opinion as an expert on RCRA  
23      definitions, how many of them indicate that they  
24      exceed the regulatory level for benzene?

25      A. Twelve out of the 18.

1 Q. All right. And those 12 samples then would  
2 indicate that they are hazardous for the toxicity  
3 characteristic for benzene?

4 A. That's correct.

5 Q. Okay. Now, getting back to the generator, you  
6 mentioned an EPA ID number?

7 A. That's correct.

8 Q. All right. What is that?

9 A. All generators of hazardous waste are required  
10 to obtain an EPA ID number. It's a 12-digit ID  
11 number, and it basically identifies them as a  
12 generator of hazardous waste. And the only legal  
13 way that that generator of hazardous waste can  
14 offer that waste to a transporter to be transported  
15 to a final disposal facility is by the use of that  
16 ID number. Authorized transporters in disposal  
17 facilities will not accept wastes from a generator  
18 that does not have an EPA ID number.

19 Q. The EPA ID number for the generator, is that a  
20 permit of some sort?

21 A. No, it is not.

22 THE COURT: Mr. Flax, push that microphone  
23 back, please.

24 THE WITNESS: Sorry, your Honor.

25 THE COURT: It's okay. You wind up a

1 little bit too close to it and we get some  
2 feedback. Thank you.

3 Go ahead, Mr. Piaggione.

4 MR. PIAGGIONE: Thank you, your Honor.

5 How does a generator determine if their waste  
6 is hazardous?

7 THE WITNESS: As I said before --

8 MR. LINSIN: Objection. Your Honor, the  
9 witness did testify to the four separate steps on  
10 this.

11 THE COURT: Yeah. Objection sustained.

12 BY MR. PIAGGIONE:

13 Q. No problem. Are there different levels of EPA  
14 oversight for generators?

15 A. Yes, there are.

16 Q. What are they?

17 A. We give most scrutiny to large quantity  
18 generators of hazardous waste. Large quantity  
19 generators of hazardous waste are those that  
20 generate greater than 1,000 kilograms or 2200  
21 pounds of regulated hazardous waste in a calendar  
22 month. We give them the most scrutiny. The  
23 thought is that the more waste that's generated,  
24 the more potential there is for mismanagement.

25 Q. Based upon your experience and knowledge of EPA

1 RCRA practices, are you aware if RCRA associates  
2 certain types of waste with a coke producing  
3 process?

4 A. Yes.

5 Q. What are they?

6 A. There is K087. K0141 through 148. There are  
7 wastes associated with coal tar management. K087  
8 is decanter sludge, tar tank decanter sludge from  
9 coking operations.

10 Q. And does the EPA have a regulatory practice to  
11 encourage recycling of hazardous waste?

12 A. Yes. There are many exclusions and  
13 opportunities in the regulations that encourage  
14 recycling. There are offices in EPA whose sole  
15 purpose is to reach out to industry -- reach out to  
16 industry to search for opportunities for recycling  
17 or for underused opportunities for recycling.

18 Q. Okay. Are there certain conditions required  
19 for recycling?

20 A. There are many conditions placed on recycling  
21 throughout the regulations.

22 Q. Okay. What are the conditions -- some of the  
23 conditions for recycling?

24 A. That there be no land disposal, that it be done  
25 within a closed-loop recycling system where there's

1 no opportunity for materials to be released to the  
2 environment, that there be no sham recycling done.  
3 That means you recycle a material that contains  
4 other toxic materials, that shouldn't be, you know,  
5 contained in it. There's many of them.

6 Q. Okay. Does RCRA allow the recycling of  
7 hazardous waste associated with coking operations?

8 A. Yes, it does.

9 Q. And are there any conditions placed on  
10 recycling of coke waste under RCRA?

11 A. Yes. The regulations specify that the coke  
12 waste generated within the coking industry can be  
13 recycled on the condition that there be no land  
14 disposal involved from the point of generation to  
15 the point where the material is reintroduced into  
16 the process.

17 Q. All right. Is K087 one of those wastes that  
18 can recycle?

19 A. Yes, it is.

20 Q. Describe for the jury the conditions a facility  
21 has to meet to recycle K087 waste under RCRA.

22 A. The facility has to ensure that there is no  
23 land disposal. Facilities I am familiar with use  
24 either a concrete pad with a steel top, 18-inch  
25 thick concrete pad with a steel top in a totally

1 enclosed unit. Another facility I'm familiar with  
2 uses a --

3 MR. LINSIN: Objection, relevance.

4 THE COURT: Well, this still relates to  
5 K087, is that what you're saying?

6 MR. PIAGGIONE: Yes, your Honor.

7 THE COURT: Okay. Overruled. I'll permit  
8 it.

9 THE WITNESS: Another facility that I have  
10 some familiarity with liquefies the coke.

11 MR. PERSONIUS: Your Honor, pardon me for  
12 interrupting. It's not responsive to the question,  
13 that's the problem.

14 THE COURT: Well, it didn't appear to be  
15 at that point. We're talking about waste -- or  
16 land disposal units, right?

17 MR. PIAGGIONE: No, your Honor. I asked  
18 him some of the conditions -- what are some of  
19 the -- excuse me. What are some of the  
20 practices --

21 MR. PERSONIUS: No, it wasn't practices.  
22 It was conditions. That's the problem.

23 MR. PIAGGIONE: Okay. I'll ask that  
24 question then, your Honor, if there's a problem  
25 with that.



1 THE COURT: Well, we need the question  
2 clear so we know what the witness is supposed to  
3 answer, please.

4 BY MR. PIAGGIONE:

5 Q. What are some of the practices within the  
6 coking industry to comply with the conditions  
7 placed on recycling of coke waste under RCRA?

8 A. Mixture on an 18-inch concrete pad with a steel  
9 cap, totally enclosed so that there is no release  
10 to the environment. Or liquefaction of the coal  
11 tar material in tanks, and then introduction to the  
12 coal conveyor belt leading into the coke ovens by  
13 spraying it on the coal. All of this is to ensure  
14 there is no releases into the environment.

15 Q. Okay. Now, with respect to this particular  
16 case, have you had an opportunity to review the EPA  
17 file and portions of the DEC file related to the  
18 Tonawanda Coke company?

19 A. Yes, I have.

20 Q. And as part of that -- that development of that  
21 case, were you involved in any way?

22 A. Yes, I was.

23 Q. And what was your involvement?

24 A. I reviewed all the inspection reports. I  
25 reviewed and authorized the information request

1 letter that we sent. I helped in the development  
2 of the enforcement action and in the settlement  
3 agreement.

4 Q. Okay. With respect to the letter you sent, I  
5 would ask that exhibit -- Government  
6 Exhibit 108-0001 be called up for identification  
7 purposes.

8 Do you recognize that?

9 A. Yes, I do.

10 MR. PIAGGIONE: Okay. Absent any  
11 objection, I would ask that this be introduced in  
12 evidence as Government's Exhibit 108.

13 MR. LINSIN: May we just scroll through  
14 the pages of the exhibit, please?

15 No objection, your Honor.

16 MR. PERSONIUS: No objection, your Honor.

17 THE COURT: Okay. No objection, one point  
18 zero --

19 MR. PIAGGIONE: 108. Your Honor.

20 THE COURT: Okay. 108 received, no  
21 objection. May be published.

22 (Government's Exhibit 108 was received  
23 into evidence.)

24 BY MR. PIAGGIONE:

25 Q. Okay. And I would ask you to explain what that

1 is.

2 A. That's a RCRA 3007 -- Section 3007 information  
3 request letter. Section 3007 of RCRA provides us  
4 with our information gathering authority. That's  
5 also the authority under which we conduct  
6 inspections. We routinely send these letters out  
7 following compliance inspections to substantiate  
8 the observations and facts gathered by the  
9 inspector during the inspection.

10 Q. And what is the date of that letter?

11 A. Dated October 30th, 2009.

12 Q. Okay. And can we go to the last page of that  
13 letter, please? Yes. Whose signature is that?

14 A. That is my signature.

15 Q. Okay. It's under the name George Meyer.

16 A. Yes. George Meyer is our branch chief. I  
17 routinely sign correspondence in his absence.

18 MR. PERSONIUS: Excuse me, your Honor.  
19 This was referred to as the last page of the  
20 exhibit and --

21 MR. PIAGGIONE: Last page of the letter,  
22 excuse me, I said.

23 MR. PERSONIUS: It's page 02, just so it's  
24 clear.

25 THE COURT: The record will so reflect.

1 MR. PERSONIUS: Thank you, Judge.

2 BY MR. PIAGGIONE:

3 Q. Okay. So you signed that letter?

4 A. Yes, I did.

5 Q. Okay. And typically how long does it take to  
6 get a response for such a request?

7 A. Generally if we're not looking for an enormous  
8 amount of information, we'll give a respondent 30  
9 days to answer our letter.

10 Q. Did you give 30 days to respond to this letter?

11 A. Yes, we did.

12 Q. And subsequently did you receive a letter back  
13 from Tonawanda Coke Corporation?

14 A. Yes, we did.

15 Q. Okay. We'd ask that Government marked for  
16 identification purposes 109 be put up for the  
17 witness.

18 Can you take a look at that please, sir? Do  
19 you recognize that?

20 A. Yes, I do.

21 MR. PIAGGIONE: Okay. Absent an  
22 objection -- we will scroll through it, and absent  
23 an objection, we'd ask that it be introduced as  
24 Government's Exhibit 109.

25 THE COURT: Okay. Start the scrolling,

1 please.

2 MR. LINSIN: No objection, your Honor.

3 MR. PERSONIUS: Your Honor, with the  
4 observation that the attachment is not included, we  
5 have no objection.

6 THE COURT: The attachment referred to in  
7 the letter?

8 MR. PERSONIUS: Yes.

9 THE COURT: All right. The record will so  
10 reflect. And we will receive 109, no objection.  
11 And it may be published.

12 (Government's Exhibit 109 was received  
13 into evidence.)

14 MR. PIAGGIONE: Thank you, your Honor.

15 BY MR. PIAGGIONE:

16 Q. I wonder if I could have a split screen between  
17 108 and 109, and if we could go to 108-002 I  
18 believe. No, 4, excuse me. Okay. And I wonder if  
19 we can focus in on this part here.

20 Now, for clarification, are you the supervisor  
21 of Leonard Grossman?

22 A. Yes, I was.

23 Q. Okay. And were you the supervisor during this  
24 period of time?

25 A. Yes.

1 Q. Okay. Were you in continued supervision of him  
2 during the time he did inspections at Tonawanda  
3 Coke?

4 A. Yes.

5 Q. Okay. Were you actively supervising him during  
6 the periods of his inspection during Tonawanda  
7 Coke?

8 A. Sometimes, yes. And sometimes I was engaged in  
9 other matters.

10 Q. Who supervised him when you were not?

11 A. The branch chief, George Meyer.

12 Q. And with respect to this letter, this was sent  
13 after you received the information from  
14 Mr. Grossman as to his observations at Tonawanda  
15 Coke?

16 MR. LINSIN: Objection, leading.

17 THE COURT: Reput the question, please.

18 BY MR. PIAGGIONE:

19 Q. Okay. Did you speak to Mr. Grossman regarding  
20 his observations at Tonawanda Coke?

21 A. Yes.

22 Q. And as a result of -- as a result of --

23 MR. LINSIN: Can we have a time frame,  
24 your Honor, please?

25 BY MR. PIAGGIONE:

1 Q. Yes. Did you speak to Mr. Grossman after his  
2 inspections at Tonawanda Coke in September of 2009?

3 A. Yes.

4 Q. Okay. And as a result of those conversations,  
5 did you determine that this letter should be  
6 issued?

7 A. Yes, we did.

8 Q. Okay. All right. And the part on the left of  
9 108, Exhibit 108-0004, can you tell us what you're  
10 asking for in that question?

11 A. We wanted to confirm statements that had been  
12 made to Mr. Grossman during the inspection that  
13 coal tar waste was being mixed directly on the  
14 ground with coal prior to introduction into the  
15 coke ovens.

16 Q. Okay. I'm going to go to 109, and I wonder if  
17 I could get this -- can we blow it up a little bit?  
18 Can we magnify that, please, Miss DiFillipo?

19 This is technology beyond my understanding,  
20 your Honor.

21 THE COURT: That top portion is from the  
22 October 30th, 2009, letter.

23 MR. PIAGGIONE: Okay. Can you read that  
24 response, please?

25 THE WITNESS: Certainly.

1 THE COURT: This is the response to the  
2 letter, is that correct?

3 MR. PIAGGIONE: This is the response to  
4 the question raised above as to how they recycle  
5 their hazardous K087 waste.

6 THE COURT: That was by virtue of the  
7 December letter of Tonawanda Coke?

8 MR. PIAGGIONE: That's correct, your  
9 Honor.

10 THE WITNESS: "Tonawanda Coke Corporation  
11 operates one self-cleaning tar decanter. The  
12 material that is automatically removed from the tar  
13 decanter, tar decanter sludge, is periodically  
14 taken by front end loader from the tar decanter to  
15 a raw material coal pile. Here the sludge is  
16 rolled into the pile for use as feedstock to the  
17 coal preparation building, and on to the coke oven  
18 battery. At no time does the tar sludge contact  
19 the ground. Also there is no ground disposal of  
20 any tar sludge. The coal piles individually and  
21 the coal storage area collectively sit upon several  
22 feet of coal above the approximately 40 feet thick  
23 layer of native impermeable clay.

24 BY MR. PIAGGIONE:

25 Q. Okay. Based upon your experience, knowledge of



1 RCRA, EAP practices, and your educational  
2 background as a geologist, is the response "at no  
3 time does the tar sludge contact the ground" an  
4 accurate description?

5 A. No, it is not.

6 Q. Why is that?

7 A. Because the facility, by not using an  
8 impermeable surface such as a concrete pad, has no  
9 way of containing the material or knowing whether  
10 or not it's reaching the grounds.

11 Q. All right. Does it matter if the ground has  
12 coal on it?

13 A. No, it doesn't. That's the ground surface.

14 Q. Okay. Does it matter if there's clay -- how do  
15 they describe it? A thick layer of native  
16 impermeable clay?

17 A. It really doesn't, because although the clay  
18 may impede the downward infiltration of the  
19 contaminants, the contaminants through runoff  
20 precipitation, there's no controlling it. It just  
21 runs laterally, and the contaminants can migrate  
22 wherever they want.

23 Q. Okay. Take that off the screen,  
24 Miss DiFilippo.

25 THE COURT: Why don't we take 15?

1 MR. PIAGGIONE: All right. Thank you.

2 (Jury excused from the courtroom.)

3 THE COURT: Okay. We'll start again at

4 11:45.

5 MR. LINSIN: Thank you.

6 THE COURT: Thank you.

7 MR. MANGO: Yes, your Honor.

8 (Short recess was taken.)

9 (Jury seated.)

10 THE COURT: Welcome back, please have a

11 seat. Okay. Attorneys and parties are back

12 present. The jury is here, roll call waived.

13 Mr. Flax, if you can resume the stand, sir.

14 You remain under oath.

15 And, Mr. Piaggione, you may resume questioning.

16 MR. PIAGGIONE: Thank you.

17 THE COURT: Direct examination.

18 BY MR. PIAGGIONE:

19 Q. Mr. Flax, just please -- please try to slow

20 down a little.

21 A. Yes, I will. I'm sorry.

22 Q. All right. Can we have Exhibit 109 brought up

23 again, please? And can we turn to .0004? Thank

24 you.

25 And who signed that response?

1 A. Mr. Kamholz did.

2 Q. Can we go back to the first page again, please?

3 And can we can go back again to this section? All  
4 right.

5 With respect to that response, what is your  
6 understanding of the ground?

7 A. The ground is simply the surface of the earth  
8 on which you walk.

9 Q. All right. And if -- if -- if it's mixed with  
10 coal, is it still the ground?

11 A. It's the ground, yes.

12 Q. If it's mixed with a clay, is it still the  
13 ground?

14 A. Yes, it is.

15 Q. Okay. So where does the ground start?

16 A. Ground starts at the point where you walk.

17 Q. Okay. If it was rocks on the ground, would  
18 that make it not the ground?

19 A. No, it would not.

20 Q. Okay. Now, this response, is that -- based  
21 upon your experience and your knowledge of RCRA,  
22 would the Tonawanda Coke Corporation's response  
23 depicted in this exhibit void the RCRA exclusion  
24 for recycling?

25 MR. LINSIN: Objection. There are a

1 number of exclusions for recycling. I'm not quite  
2 certain which one counsel is referring to. Can we  
3 be clear?

4 MR. PIAGGIONE: Sure.

5 THE COURT: If you can refine it, please.

6 MR. PIAGGIONE: Yes, your Honor.

7 Based upon your experience and knowledge of  
8 RCRA, would the mixing of -- as described in this  
9 response, void the RCRA exclusion for -- for  
10 recycling for -- because of land disposal?

11 THE WITNESS: Yes.

12 MR. PERSONIUS: Object to be that.

13 THE COURT: Yeah, sustained. Bad  
14 question.

15 MR. PIAGGIONE: Okay.

16 THE COURT: That's not a legal ground, but  
17 give it another try.

18 MR. PIAGGIONE: Okay. Based upon your  
19 experience and knowledge, would the mixing -- this  
20 response indicate that Tonawanda Coke is entitled  
21 to the exclusion for mixing -- for recycling,  
22 excuse me -- entitled to the exclusion for  
23 recycling under RCRA?

24 MR. LINSIN: Your Honor, same objection.

25 THE COURT: Yeah, sustained.

1 MR. PIAGGIONE: One moment, your Honor?

2 THE COURT: Yes.

3 BY MR. PIAGGIONE:

4 Q. Based upon this response, would the mixing of  
5 K087 waste on the coal piles as depicted here fit  
6 within the description of the exclusion for  
7 recycling under RCRA?

8 A. No, I believe it is contrary to the description  
9 in the exclusion.

10 Q. Okay. Now, based upon your experience and  
11 knowledge of RCRA, if tar sludge was in a tank when  
12 RCRA took effect --

13 THE COURT: Redo it again.

14 BY MR. PIAGGIONE:

15 Q. Okay. Based upon your experience and knowledge  
16 of RCRA, if tar sludge was in a tank when RCRA took  
17 effect, could EPA require a permit for it?

18 A. Yes, it could.

19 Q. Under what conditions?

20 MR. LINSIN: Objection. Relevance.

21 THE COURT: Relevance?

22 MR. PIAGGIONE: Your, Honor there is tar  
23 sludge that was placed in a tank before RCRA took  
24 effect in this case. I'm asking him could that be  
25 subject to regulation by RCRA.

1 MR. LINSIN: There's no charge in this  
2 count that relates to a permit.

3 THE COURT: There isn't.

4 MR. PIAGGIONE: I will show the connection  
5 in a moment, your Honor, if I could.

6 THE COURT: All right. I mean, if you  
7 connect it up, I'll give you one or two questions  
8 in that regard. But there are no charges with  
9 respect to the tar sludge in the tank.

10 MR. PIAGGIONE: Actually, if you look at  
11 the charges, your Honor, there is charges that --  
12 we'll get to that. I believe there is charges  
13 regarding the release of that tar sludge, your  
14 Honor.

15 THE COURT: That's the overrun. That's a  
16 different issue.

17 MR. PIAGGIONE: Okay.

18 THE COURT: Mr. Linsin, go ahead.

19 MR. LINSIN: Well, I would like to be  
20 heard on that issue precisely if -- if this is  
21 where -- if that is where this is going. Because I  
22 see no -- no charge in 17, 18 or 19 that relates to  
23 a release from any of the tanks.

24 THE COURT: All right. I mean, what was  
25 in the tank, there is testimony that that's from a

1 prior owner as well.

2 MR. LINSIN: And a stipulation, that is  
3 correct. And my objection, your Honor, really  
4 relates to focusing this testimony on the charges  
5 that are actually charged in this indictment, not  
6 what may have otherwise been a RCRA violation.

7 THE COURT: Okay. It's not necessary, as  
8 I see it, for background to the charged violation.  
9 You tell me -- yes, go ahead.

10 MR. PIAGGIONE: May I have a -- this  
11 involves active management, your Honor. And it  
12 goes to that point. Perhaps if we had a side bar  
13 we can discuss that, considering that there is a  
14 restriction on discussing what active management  
15 actually is.

16 THE COURT: Go ahead.

17 MR. PIAGGIONE: Your Honor, if you recall,  
18 you have provided a definition of active  
19 management, and this goes to that issue, and  
20 therefore I want to -- without discussing it in  
21 front of the jury, thus violating your order, I ask  
22 for a side bar.

23 THE COURT: One second, please.

24 MR. PIAGGIONE: I can try a hypothetical,  
25 your Honor, perhaps --

1 THE COURT: Do we have an active  
2 management here, Mr. Linsin, because --I mean, it  
3 is -- active management is regulated if it's after  
4 November of 1990, right?

5 MR. LINSIN: The time period in -- with  
6 respect to Count 17 begins in 1998. Time period  
7 with respect to Count 18 begins in 2009.

8 THE COURT: Okay. But the definition  
9 relates to active management post-November 1980,  
10 which would be subject to RCRA regulation.

11 MR. LINSIN: Correct. And if we  
12 approached this questioning through the lens of the  
13 actual charge, that is where -- what I was trying  
14 to avoid, your Honor, was a hypothetical discussion  
15 about permitting requirements concerning materials  
16 that have no relation to this.

17 If we could perhaps approach the issue  
18 through -- through what is actually charged in  
19 Count 17 -- and obviously, yes, we agree active  
20 management is an issue. But for clarity and for  
21 relevance purposes, I would request that we  
22 approach it through the actual charge that is  
23 before the jury.

24 THE COURT: Okay. Let's try to do it that  
25 way, Mr. Piaggione. And you have the definition of



1 active management. We have the charges in the time  
2 frame that are stated by the charges, and you have  
3 to work with that, and then I'll entertain any  
4 objections, if there are any, to the manner in  
5 which you approach it.

6 MR. PIAGGIONE: Okay. Thank you, your  
7 Honor.

8 BY MR. PIAGGIONE:

9 Q. If material stored in the tank from at least  
10 May of 1998 to 2009, if this material was --  
11 exhibited the characteristic for benzene, and it  
12 was released from that tank and sat on the ground  
13 for about a year before removal, would RCRA apply?

14 A. Yes, it would.

15 Q. Why?

16 A. Facilities are required to maintain themselves  
17 in order to prevent accidental, sudden, or  
18 non-sudden releases of hazardous wastes or  
19 hazardous constituents. It's obvious by this  
20 occurrence that that was not done.

21 Also the material staying on the ground for a  
22 year, there's some reasonable expectation that when  
23 a release of hazardous waste occurs at a facility,  
24 that the facility will take some very, very -- if  
25 not immediate, very, very soon action to clean that

1 up and to remedy any harm that that might have  
2 caused.

3 That was not done in this case. So I would say  
4 that I would bring a charge against this facility  
5 if I was to do this under my civil authority for --

6 MR. LINSIN: Objection, your Honor.

7 THE COURT: We have a narrative response  
8 to a direct question.

9 MR. PIAGGIONE: Just try to limit your  
10 response, please.

11 THE COURT: Is that your objection or --

12 MR. LINSIN: Yes, it is narrative. And  
13 also opinions as to what might constitute a civil  
14 offense is irrelevant as well.

15 THE COURT: Okay. And there's references  
16 to this case, without specifics in that regard, so  
17 it's difficult to determine the bases you're  
18 referring to without better questions. Or at least  
19 incremental questions.

20 BY MR. PIAGGIONE:

21 Q. Just try to respond to my questions, please.

22 A. Okay.

23 Q. All right. If a material was released from a  
24 tank which had been in the tank from at least May  
25 of 1998 to about December 17th, 2009, if that

1 material was -- had the characteristic of benzene,  
2 and it was leaked on to the ground and left there  
3 for about a year before removal, how would RCRA  
4 apply?

5 MR. PERSONIUS: Your Honor, that's just  
6 the question we had.

7 THE COURT: I think it's slightly  
8 different actually I think. Your first question  
9 was would RCRA apply. Now it's how would RCRA  
10 apply. Did you want to make it that way? Is that  
11 your question?

12 MR. PIAGGIONE: Yes.

13 MR. PERSONIUS: I guess you're going to  
14 have to overrule my objection, Judge. I think it's  
15 the same question.

16 THE COURT: Is your answer any different?

17 THE WITNESS: No, my answer wouldn't be  
18 any different.

19 THE COURT: Okay. So I'll sustain the  
20 objection.

21 MR. PERSONIUS: Thank you, Judge.

22 MR. PIAGGIONE: All right. If there was  
23 material on the ground for at least -- if there was  
24 from at least May of 1998 to about  
25 December 17, 2009, and there was a subsequent

1 additional release from a tank into that same area  
2 where this material was on the ground, would RCRA  
3 apply to that?

4 MR. LINSIN: Objection, relevance.

5 THE COURT: In the form of the question  
6 you're talking subsequent to what? What period?  
7 That last 2009 date that you gave?

8 MR. PIAGGIONE: I said from -- if the  
9 material -- yes, your Honor. The material --

10 THE COURT: So it would be 2009 forward.  
11 From November of 2009 forward, is that the  
12 subsequent --

13 MR. PIAGGIONE: No, your Honor. I'll  
14 rephrase the question.

15 THE COURT: Okay. To the form of the  
16 question, I'll sustain the objection. It may be my  
17 inability to follow it. Maybe it's clear to  
18 everybody else, but restate it.

19 MR. PIAGGIONE: Okay. If there was  
20 material on the ground from at least May of 1998 to  
21 about December 17th, 2009, and it was -- material  
22 was leaked from a tank nearby which had also the  
23 characteristic of benzene in 2008, would RCRA apply  
24 to that material on the ground which -- as a result  
25 of that release?

1 MR. PERSONIUS: Your Honor, I hate do it,  
2 but I object.

3 THE COURT: Yeah, sustained.

4 MR. LINSIN: I do as well.

5 THE COURT: Take a minute. Sit down,  
6 craft the question, okay? Please.

7 MR. PIAGGIONE: Okay. Let's try to walk  
8 through this again. Let me provide you with a  
9 hypothetical. Let's say in 1998 coal tar material,  
10 which was toxic for benzene, was placed on the  
11 ground and had been on the ground before May of  
12 1998. And coke breeze --

13 THE COURT: Wait. Start it again.

14 BY MR. PIAGGIONE:

15 Q. Okay. If coal tar was on the ground in 1998  
16 and coke breeze was placed on the coal tar after  
17 that time, would RCRA apply?

18 A. Yes.

19 Q. How would it apply?

20 A. I believe the addition of the coal breeze to  
21 the -- coke breeze to the coal tar on the ground  
22 would be treatment, because it changes the physical  
23 nature of the material under RCRA.

24 Q. Okay. If coal tar was on the ground from at  
25 least May of 1998, which is toxic for benzene, and

1 coal tar from a tank was permitted to be mixed with  
2 it, would RCRA apply?

3 MR. PERSONIUS: Your Honor, I object on  
4 relevancy grounds. There may be a 404(b) issue  
5 too. I don't know where this is going, but both of  
6 those are grounds for objection.

7 THE COURT: Well, I don't know where it's  
8 going exactly either. I'll give you a little time  
9 to work with it. I don't know if it is a 404(b),  
10 unless you're more specific in that regard.

11 MR. LINSIN: Well, that is part of the  
12 problem, your Honor. We seem to be combining many  
13 issues in each of these questions, and it's very  
14 difficult to track them out.

15 MR. PERSONIUS: And, Judge, I know you  
16 don't want to excuse the jury, but I'm concerned  
17 about where this is headed. And I'm not even sure  
18 doing it -- and I don't like side bars. I don't  
19 like asking the jury to leave, but I'm getting  
20 concerned about where this is headed.

21 THE COURT: Okay. Well, he's probably  
22 right. I don't like to get rid of you, but I think  
23 this time we better do it for a little while. Let  
24 me get this sorted out, and we'll bring you back as  
25 soon as we can.

1           If you don't hear from me in a reasonable  
2       period of time, you can beat feet out of here and  
3       we'll track you down, okay?

4                       (Jury excused from the courtroom.)

5           MR. LINSIN: If we're going to be  
6       discussing these issues, I would request the  
7       witness be excused, please.

8           THE COURT: Mr. Flax, if you can step out  
9       to the lobby, please.

10          THE WITNESS: Thank you, your Honor.

11          THE COURT: Thank you.

12                       (Witness excused from the courtroom.)

13          THE COURT: Okay. I guess I'll let you  
14       take the lead, Mr. Personius. Are we running the  
15       risk of flying in the face of the ruling that  
16       relates to those 13 categories?

17          MR. PERSONIUS: I think it's even worse  
18       than that. I don't think it was in that list.  
19       What I'm hearing is -- I think where this is  
20       headed, Judge, is that you have the coal tar around  
21       the two abandoned tanks.

22          THE COURT: Right.

23          MR. PERSONIUS: There has been some  
24       testimony that could -- I don't think it  
25       necessarily does -- could support an argument that

1 around the time the fire occurred that there was  
2 some leakage from the inside of the tank on to that  
3 existing coal tar base. Whether that occurred or  
4 not, there is no charge in this case regarding a  
5 violation of RCRA based on that incident, nor did  
6 we get notice in the government's 404(b) disclosure  
7 that they intended to get into whether or not that  
8 event, if it occurred, would constitute a RCRA  
9 violation. That's where I think we're headed. And  
10 I don't think we should be there.

11 THE COURT: All right. Is that where we  
12 are going?

13 MR. PIAGGIONE: No, your Honor. What we  
14 are trying to explain is the issue for whether or  
15 not this material on the ground is subject to RCRA  
16 is if it was actively managed. One of the factors  
17 for active management is additions to that  
18 material. And this release was an addition to that  
19 material, hence it falls within the definition of  
20 active management.

21 I didn't want to argue that in front of the  
22 Court -- in front of the jury because you had ruled  
23 we were not supposed to explain that in front of  
24 the jury. Your Honor, it's my understanding that  
25 the --



1           THE COURT: Does that -- does that make  
2 sense to you?

3           MR. PERSONIUS: I had understood, and I  
4 look Mr. Linsin, because he clearly knows more  
5 about this -- the technical environmental arguments  
6 than I do, Judge. I understood the active  
7 management argument in this case was based upon the  
8 spreading of coke breeze on the coal tar around  
9 these abandoned tanks, which occurred back around  
10 1998.

11           MR. MANGO: And then the excavation of the  
12 material, your Honor, if I can add in. And then  
13 the excavation of the material.

14           THE COURT: Help me out here, Mr. Mango.  
15 Give me a capsule on it.

16           MR. MANGO: Yes, your Honor. I think what  
17 Mr. Piaggione here is attempting to set up is in  
18 Count 18 we have material -- now from testimony  
19 where there was material on the ground.

20           THE COURT: That's the coal tar sludge.

21           MR. MANGO: Coal tar sludge, and then  
22 there was a fire which affected the area. And  
23 according to some testimony, additional material  
24 ran out on to the ground around the area.

25           THE COURT: All right. In the direction

1 of the piled coal tar sludge that existed from  
2 1998.

3 MR. MANGO: Correct, your Honor. So  
4 Count 18 then captures the excavation of that  
5 material for the period of time between June of '09  
6 and September of '09. The excavation of the  
7 material in and around the tanks. And then the  
8 placement of that material on to the coal piles.

9 So I think what Mr. Piaggione here is trying to  
10 set up is just to get us to that count. In terms  
11 of --

12 THE COURT: And by adding that runoff  
13 material to what was stationary, that constitutes,  
14 from your standpoint, active management that  
15 relates to Count 19.

16 MR. PIAGGIONE: Count 17.

17 THE COURT: Or seventeen.

18 MR. MANGO: Seventeen and 18. Seventeen,  
19 your Honor, also charges for the time period  
20 between May of '98 up until the time of the  
21 criminal search warrant, December 17th, '09, which  
22 would capture the fire event as one of the -- one  
23 of the arguments that the government is claiming  
24 contributed to the active management of the area.

25 It's not simply, in the government's view, the

1 placement of the coal breeze on top of the surface  
2 that gives us Count 17 here. It's the fact that  
3 they ripped these tanks out of the ground and  
4 disturbed the area and then let a fire occur to  
5 further disturb the area, and then more stuff came  
6 out on to the ground.

7 THE COURT: And they moved that, and that  
8 becomes part of the active management, and they  
9 added that to the stationary pile --

10 MR. MANGO: Yes, your Honor.

11 THE COURT: -- that was in existence at  
12 the time, which makes it, at least under your  
13 theory, a violation of RCRA.

14 MR. MANGO: Yes, your Honor.

15 MR. LINSIN: Your Honor, may I go back to  
16 one of the original points I was trying to make  
17 here?

18 MR. PIAGGIONE: Your Honor, if I could,  
19 it's my understanding the defense experts are in  
20 the courtroom. Could they be excluded as well?

21 Is that what I understand from Mr. Mango, is  
22 the expert witnesses from defense --

23 MR. LINSIN: I don't believe our experts  
24 are within 3,000 miles of this courthouse at this  
25 point.

1 MR. PIAGGIONE: Then withdrawn, your  
2 Honor.

3 MR. LINSIN: The concern I have with the  
4 way counsel is structuring the questions is this,  
5 your Honor. He is focusing his questions on this  
6 process of release from the tanks, and then posing  
7 a question would that be covered by RCRA. And my  
8 concern is that the implication in the way this  
9 questioning is going is that, see, this release is  
10 a violation of RCRA. And that is not the argument  
11 we just heard. It is not the rationale for which  
12 this opinion is being offered. And what I had  
13 asked initially was that the questions be framed in  
14 terms of and focused on what the allegations are,  
15 and then ask questions about active management, and  
16 would this event constitute active management in  
17 your opinion. My concern is that we're throwing  
18 off these terms, and would this be covered by RCRA.  
19 It is just -- I think it runs the risk of  
20 misapprehension on the jury's part that there are  
21 multiple serial violations of RCRA that are not  
22 charged in the indictment, and that is my concern.

23 We have disagreements, obviously, on the  
24 premise regarding active management. But it is --  
25 it was the structure of the questioning that I was

1 concerned about.

2 THE COURT: Yeah, for example, the release  
3 itself is -- in and of itself is not a violation of  
4 RCRA necessarily.

5 MR. LINSIN: It is certainly not charged  
6 in this indictment, yes.

7 MR. MANGO: Your Honor, if we could have  
8 five minutes, we'll refine some questions. I can  
9 get them very focused, and -- the questions very  
10 focused on the issues at hand, and if we could have  
11 five minutes?

12 THE COURT: Well, can we -- can we call  
13 the matter of active management to the attention  
14 the jury without that being unfairly prejudicial?

15 MR. LINSIN: I'm not sure what the  
16 Court's -- call the matter of active management?  
17 I'm not sure what you're proposing, your Honor.

18 MR. MANGO: Your Honor, my understanding  
19 of your ruling is -- and I've got it here -- we  
20 can't discuss what the definition -- through our  
21 collective government or defense witnesses, we  
22 can't have them offer opinions as to what active  
23 management means.

24 But I think what the -- where the Court is  
25 going is we need to at least have the witness say

1       why this would be covered under RCRA, and I think  
2       it would be appropriate to say this would  
3       constitute active --

4               THE COURT:   Management.

5               MR. MANGO:   Right.

6               MR. LINSIN:   Well, I agree with the latter  
7       proposition. I disagree -- as I read the Court's  
8       opinion regarding these definitions, it was a  
9       matter of not inviting the witnesses to opine about  
10      different definitions or different theories. I  
11      would presume that these expert witnesses would  
12      need to make reference to the definitions that the  
13      Court has provided, yes.

14              MR. MANGO:   Yes.

15              THE COURT:   And you can do it that way.  
16      Try to set it up that way. That makes it more  
17      understandable, because these terms now will become  
18      familiar to the jury, and we can --

19              MR. LINSIN:   And as long as it is tied to  
20      the counts, that -- that is my concern, that the  
21      jury not be -- that it not be implied in front of  
22      the jury that there are just these serial RCRA  
23      violations and without -- you know, with the  
24      prejudice that that would result in.

25              THE COURT:   I think that's a legitimate

1 concern. Because if every reference that you make  
2 to some activity you have the witness testify that  
3 that's a RCRA violation, when it doesn't  
4 necessarily constitute what's charged, that can be  
5 problematic. Because that's almost like a  
6 propensity-type of argument I think. So you've got  
7 to be careful of that.

8 MR. PIAGGIONE: Yes, your Honor. The  
9 question was how does RCRA apply, not whether it  
10 was a violation. I just point that out. If we can  
11 use "active management", the word "active  
12 management", that's fine. I was trying to avoid  
13 that issue, so we did not violate the Court's  
14 order.

15 THE COURT: Okay. We all know what your  
16 questions were, so just get to staging it as part  
17 of active management, and then we'll go from there,  
18 but as it relates to the, Count 17, et cetera.

19 MR. MANGO: Absolutely.

20 MR. PERSONIUS: Judge, I don't mean to  
21 prolong this. Can I make one other point because  
22 it might tie into a hypothetical.

23 THE COURT: Yes.

24 MR. PERSONIUS: I think it was Mr. Mango  
25 when he was explaining the evidence indicated that

1       there's been evidence that the excavation activity  
2       at these tanks included the material outside the  
3       tanks. And I haven't -- that's not my -- if  
4       there's going to be a hypothetical about removal of  
5       material, the only testimony I've heard is removal  
6       of material from inside, not outside the tanks.  
7       And maybe I missed the testimony.

8               MR. LINSIN: That is what my notes reflect  
9       as well, your Honor.

10              MR. PERSONIUS: I don't want a  
11       hypothetical based on outside.

12              THE COURT: I don't think he is. You're  
13       talking about the inside materials.

14              MR. MANGO: Yes. I may have misspoke.

15              MR. PERSONIUS: Just wanted to make sure.  
16       Thank you for doing this, Judge. Thank you.

17              THE COURT: As you know, I try to do as  
18       much in front of the jury as we can, because it  
19       keeps them engaged for one thing.

20              MR. PERSONIUS: Right.

21              THE COURT: As long as they understand  
22       what we're doing is not in any way evidence from  
23       their standpoint. And, you know, but a point like  
24       that is well taken. Thank you.

25              MR. PERSONIUS: Thank you, Judge.



1 THE COURT: Five, sure.

2 (Short recess was taken.)

3 (Jury seated.)

4 THE COURT: I must admit we did get a  
5 little worried. We thought we might have to track  
6 you down a little bit. I'm glad to see that  
7 everybody's back. Please have a seat.

8 Mr. Flax remains on the stand. He remains  
9 under oath. Thank you for bearing with us. We're  
10 going to be -- this is part of our physical fitness  
11 aspect of the case. We'll be moving you back and  
12 forth a little bit. We won't go much longer, and  
13 we'll break for the regular time. And we should be  
14 in a better position to move through everything  
15 okay?

16 Thank you. The attorneys and parties are back  
17 present. You, of course, are all here, roll call  
18 waived, and it's always nice to see.

19 We're going to give Mr. Piaggione the podium  
20 again and see what he does.

21 MR. PIAGGIONE: Thank you, your Honor.

22 BY MR. PIAGGIONE:

23 Q. Now, I you want to ask you a hypothetical. If  
24 material was placed on the ground prior to 1978, is  
25 that subject to RCRA?

1 A. Not if it was not actively managed after 1981  
2 when RCRA was implemented.

3 Q. Okay. What you would call --

4 MR. LINSIN: Your Honor, I apologize.  
5 Could we get clarification about what material this  
6 hypothetical relates to?

7 THE COURT: Yes.

8 BY MR. PIAGGIONE:

9 Q. Okay. If coal tar was placed on the ground  
10 prior to 1978, is that subject to RCRA?

11 A. Not if it was not actively managed after the  
12 implementation date of RCRA in 1980.

13 Q. What would you call that -- that area which  
14 contained this coal tar?

15 A. We call pits -- pits, service impoundments.  
16 landfills, we call them land disposal units.

17 Q. Okay. Now, if the same land disposal unit was  
18 in 1978 subject to coke breeze being spread on the  
19 top of it, subject to 1998, would RCRA apply?

20 A. Yes, it would.

21 Q. Why?

22 A. Because that material in that pit had been  
23 actively managed.

24 Q. Okay. Now, if this material in this land  
25 disposal unit we've just described was moved and

1 consolidated after 1998, would RCRA apply?

2 MR. PERSONIUS: Your Honor, I object to  
3 that. There's no foundation for that hypothetical.

4 THE COURT: I think to the form of the  
5 question -- I think it's improper in that form.  
6 Objection sustained.

7 MR. PIAGGIONE: If -- may I try again,  
8 your Honor?

9 If the coal tar in the land disposal unit was  
10 consolidated, would that constitute -- would RCRA  
11 apply?

12 MR. LINSIN: Objection, lack of  
13 foundation.

14 MR. PIAGGIONE: If --

15 THE COURT: No.

16 MR. PIAGGIONE: I'm sorry. Your Honor,  
17 there is testimony that this material was moved.

18 THE COURT: Okay. Try it one more time.

19 MR. PIAGGIONE: Okay. Now, if this  
20 material that I referred to before in the land  
21 disposal unit --

22 THE COURT: "Material" meaning?

23 MR. PIAGGIONE: The coal tar sludge --  
24 excuse me. The coal tar on the ground in the land  
25 disposal unit was moved after 1998, would RCRA

1       apply?

2               MR. LINSIN: Your Honor, I'm going to  
3       object on this basis. Now these questions appear  
4       to be related to the material that was on the  
5       ground. The hypotheticals are premised on the  
6       material being coal tar sludge. The allegations in  
7       Count 17 and 18 do not allege coal tar sludge being  
8       either in the tanks or on the ground. This --  
9       this -- these hypotheticals, this line of  
10      hypotheticals has nothing to do with the  
11      allegations that exist in Count 17 and 18.

12             THE COURT: All right. You know, I'm not  
13      sure when you talk about the material being coal  
14      tar sludge, if it's with or without the coke dust  
15      that was mixed. I mean, I think --

16             MR. LINSIN: But, your Honor, the  
17      allegation in 17 and 18 relates to D018, which is  
18      not coal tar sludge. It is a different waste under  
19      the regulations. We are off in a territory that is  
20      not alleged in 17 or 18.

21             MR. PIAGGIONE: Your Honor, I can modify  
22      the hypothetical.

23             THE COURT: Well, that's correct, right?

24             MR. PIAGGIONE: Yes. I can modify the  
25      hypothetical.

1 THE COURT: Okay. We'll see everybody at  
2 2:00 o'clock. Take a break.

3 (Jury excused from the courtroom.)

4 THE COURT: Okay. Mr. Flax, you can step  
5 down. Thank you.

6 All right. Either you get the act together on  
7 the questioning --

8 MR. PIAGGIONE: We will, your Honor.

9 THE COURT: -- hypothetical or factual.  
10 If there is further objections along this line,  
11 I'll just sustain every single objection, and you  
12 won't get a second opportunity. I think that's  
13 only fair at this point. So, either you get it  
14 right this time or it will not get in. Okay?

15 MR. PIAGGIONE: Yes, your Honor.

16 MR. MANGO: Yes, your Honor, absolutely.

17 MR. PERSONIUS: Your Honor, I'm sorry  
18 to --

19 THE COURT: No, it's okay.

20 MR. PERSONIUS: -- to do this too.

21 THE COURT: It's all right.

22 MR. PERSONIUS: I preface this by saying  
23 I'm not an environmental lawyer. I'm leaving this  
24 part of the case to Mr. Linsin. But my very  
25 fundamental understanding of these charges is it's

1 not being alleged that any movement of this, what I  
2 think is called coal tar that's outside the tank,  
3 that the movement of that is a RCRA violation.

4 THE COURT: It's the adding on that was  
5 testified to as being the active management.

6 MR. PERSONIUS: Adding on. We've had a  
7 hypothetical about movement, and there was some  
8 testimony that when the coke breeze was added, it  
9 made the coal tar move. But that I don't believe  
10 is the basis for the counts in the indictment. I  
11 could be wrong, Judge. I'm just telling what I  
12 think.

13 MR. LINSIN: Well, your Honor, I also  
14 objected to -- there was a hypothetical about  
15 consolidation of a land disposal unit. Counsel  
16 should know these are terms of art in environmental  
17 regulation, and it has nothing to do with these  
18 charges.

19 THE COURT: Well, I think that was a  
20 throw-in, frankly. Because I think it destroyed  
21 the hypothetical. It didn't make sense to me, but  
22 again, Mr. Personius, I hear what you're saying.

23 Go ahead, Mr. Linsin.

24 MR. LINSIN: No, no. I was just wanting  
25 to clarify that it was movement, then it was

1 consolidation, and it's just -- these terms mean  
2 things under the regulations.

3 MR. MANGO: Your Honor, we will clarify,  
4 but there is an issue with the movement of this  
5 material. When the coke breeze was added on top,  
6 there was testimony that the coal tar migrated and  
7 moved and consolidated. And that under -- under  
8 your Honor's definition and according to --

9 Mr. Flax, you want to go outside for a second?

10 (Witness left the courtroom.)

11 MR. MANGO: Your Honor, I believe under  
12 Mr. Flax's interpretation of RCRA that the adding  
13 of the coke breeze, which caused the movement of  
14 the coal tar, constitutes active management.

15 THE COURT: But that's not migration.

16 MR. PIAGGIONE: That's disturbing.

17 MR. MANGO: That is disturbing the  
18 material by causing it to move. But we will again  
19 have just a very few limited focused hypotheticals  
20 when we come back.

21 THE COURT: Okay. The focus of the  
22 hypotheticals will not be coal tar sludge.

23 MR. MANGO: No, that, I believe was a --  
24 was an accident. It will be coal tar that exhibits  
25 the toxicity characteristic for benzene. That's

1       how it's going to be described.

2               MR. LINSIN: It is material that exhibits  
3 the toxicity for benzene. That is what is alleged  
4 in 17 and 18, and that is D018.

5               MR. MANGO: We'll use that term.

6               THE COURT: It says the waste exhibiting.

7               MR. LINSIN: Exactly. That's fine.

8               MR. PIAGGIONE: We'll use that in our  
9 hypothetical.

10              MR. MANGO: Yes, your Honor. We were just  
11 trying to incorporate some of the testimony that  
12 called this material coal tar. But we'll call it  
13 the waste exhibiting the toxicity characteristic  
14 for benzene. I think to be consistent and fair to  
15 the language in the indictment, we will keep our  
16 hypothetical limited to that language.

17              THE COURT: I think you have to do that,  
18 because the substance then would not be what you've  
19 charged in the indictment as I see it.

20              MR. MANGO: Yes. Absolutely.

21              THE COURT: All right.

22              MR. LINSIN: Thank you, your Honor.

23              MR. PERSONIUS: Thank you, Judge.

24              (Lunch recess was taken.)

25              (Jury not present in the courtroom.)



1 THE COURT: Okay. Thank you. Please have  
2 a seat. Chris, please.

3 Mr. Flax, want to resume the stand, please?

4 (Jury seated.)

5 THE COURT: You know there's only limited  
6 frivolity allowed during this trial. Good to see  
7 you back. Please have a seat.

8 Okay. The attorneys and parties are back  
9 present. Mr. Philip Flax is back on the stand. He  
10 remains under oath. It's still the government's  
11 direct examination.

12 Mr. Flax, as you know, has been tendered as an  
13 expert witness. And, Mr. Piaggione, you may resume  
14 questioning.

15 MR. PIAGGIONE: Thank you, your Honor.

16 BY MR. PIAGGIONE:

17 Q. Mr. Flax, I would like to try again to give you  
18 a couple of hypotheticals. First, assume for a  
19 moment that in 1978 a waste exhibiting the toxicity  
20 characteristic for benzene, a hazardous waste under  
21 RCRA, was present on the ground adjacent to two  
22 large tanks. Would the fact that the hazardous  
23 waste is on the ground make it subject to RCRA?

24 A. No. If it was placed there prior to RCRA's  
25 implementation date, as long as it was not actively

1 managed, it would not be subject to regulation.

2 Q. Now, are you familiar with what coke breeze is?

3 A. My understanding is that coke breeze are fine  
4 particles of coke.

5 THE COURT: All right. Is that a yes or  
6 no?

7 THE WITNESS: Yes.

8 THE COURT: Thank you.

9 THE WITNESS: Sorry, your Honor.

10 BY MR. PIAGGIONE:

11 Q. What is coke breeze?

12 A. Coke breeze is fine particles of coke.

13 Q. With the information I already provided you,  
14 again, the waste exhibiting the toxicity  
15 characteristic for benzene, a hazardous waste under  
16 RCRA, was present on the ground adjacent to two  
17 large tanks since 1978, and now in 1998 coke breeze  
18 was placed on the surface of the hazardous waste,  
19 would those facts subject the hazardous waste to  
20 RCRA regulation?

21 A. Yes, they would.

22 Q. Can you explain why for the jury?

23 A. The application of the coke breeze to the  
24 previously deposited hazardous waste significantly  
25 disrupted or disturbed that waste, and therefore

1 the waste was actively managed, which now makes it  
2 subject to regulation.

3 Q. With the information that I already provided  
4 you, assume that if the placement of the coke  
5 breeze on to the surface of the hazardous waste  
6 with heavy equipment caused the hazardous waste to  
7 move toward the two large tanks, would those facts  
8 subject the hazardous waste to RCRA regulation?

9 A. Yes.

10 Q. Can you explain why to the jury?

11 A. Once again, the movement of this waste caused  
12 by the heavy equipment is disturbing and disrupting  
13 it. That is active management and subjects that  
14 waste to regulation.

15 Q. Okay. With the information I already provided  
16 you, assume that in 2008 additional coke breeze was  
17 placed on the surface of the hazardous waste.

18 Would those facts subject the hazardous waste to  
19 RCRA regulation?

20 A. Once again, significant --

21 Q. Is that yes or no?

22 A. Yes.

23 Q. Okay. Can you explain why for the jury?

24 A. The application of the coke breeze disturbs or  
25 disrupts the waste, therefore it's being actively

1 managed, therefore it's subject to regulation.

2 Q. Now, with the information I already provided  
3 you, assume that in 2008 additional waste  
4 exhibiting the toxicity characteristic for benzene,  
5 a hazardous waste under RCRA, flowed on top of the  
6 hazardous waste that was on the ground around the  
7 two large tanks. Would those facts subject the  
8 hazardous waste now on the ground to RCRA  
9 regulation?

10 A. Yes.

11 Q. Can you explain why for the jury?

12 A. Inaction to quickly address that release and  
13 clean it up constitutes storage under RCRA.

14 MR. LINSIN: I apologize, but could I ask  
15 the witness to repeat that question [sic]? I could  
16 not -- either it was not responsive or I didn't  
17 understand what was said.

18 THE COURT: Okay. I mean, the answer --  
19 well, okay.

20 I'll let you answer the question. Can you put  
21 that answer again, please?

22 THE WITNESS: Sure. The failure to timely  
23 address that release of hazardous waste and clean  
24 it up, and leave it on the ground for an extended  
25 period of time constitutes storage under RCRA.

1 BY MR. PIAGGIONE:

2 Q. Would it constitute active management?

3 A. Storage by definition is active management.

4 Q. Okay. Are you familiar with the concept of  
5 active management?

6 A. Yes.

7 Q. Okay. Are you familiar with the definition of  
8 active management as defined by this Court as  
9 physically disturbing accumulated waste within a  
10 management unit, or disposing of additional  
11 hazardous waste in existing units containing  
12 previously disposed wastes. In other words, it  
13 means taking some action to disturb or disrupt  
14 contained hazardous waste or adding hazardous waste  
15 to previously contained materials. If active  
16 management occurs after November 19th, 1980, it is  
17 subject to regulation under RCRA.

18 A. Yes, I am.

19 Q. Did you -- did your opinion incorporate that  
20 definition?

21 A. Yes, I did.

22 Q. Okay. Now, let me ask you another  
23 hypothetical. Assume that a waste exhibiting the  
24 toxicity characteristic for benzene, a hazardous  
25 waste under RCRA, was removed from its location and

1 placed into coal piles on the ground, would that --  
2 would those facts subject the hazardous waste to  
3 RCRA regulation?

4 A. Yes.

5 Q. Why?

6 A. The failure to use an impervious barrier that  
7 prevents the uncontrolled release of the coke waste  
8 when it's applied to coal subjects the facility the  
9 loss of the exception in the regulations for that  
10 particular waste, so that waste now becomes  
11 regulated.

12 THE COURT: All right. Give me that  
13 answer again, please.

14 THE WITNESS: Sure. The failure of the  
15 facility to use an impermeable barrier while they  
16 mix the coal tar waste with the coal -- the coking  
17 waste with the coal and not controlling releases  
18 causes the loss of the exception in the regulations  
19 for the recycling of that material.

20 Basically what has happened, the regulations  
21 allow this exception that if you take that waste  
22 from the point of generation until it's recycled in  
23 the coke ovens and there was no land disposal, you  
24 maintain that exception. The material is not  
25 regulated. But once you take that material without

1 using an impermeable barrier to contain and control  
2 this waste material when you apply it to the coal,  
3 you lose that exception. The material becomes  
4 regulated.

5 BY MR. PIAGGIONE:

6 Q. Okay. I had asked you a question about waste  
7 exhibiting the toxicity characteristic for benzene,  
8 a hazardous waste under RCRA. Not coal tar, not  
9 coal tar sludge.

10 A. I'm sorry.

11 Q. So let me ask you that again. Assume that a  
12 waste exhibiting the toxicity characteristic for  
13 benzene, a hazardous waste under RCRA, was removed  
14 from its location and placed into coal piles on the  
15 ground, would those facts subject the hazardous  
16 waste to RCRA regulation?

17 A. Yes.

18 Q. Why?

19 A. Because failure to use an impermeable barrier  
20 when mixing this toxicity characteristic hazardous  
21 waste with coal causes the loss of the exception in  
22 the regulations which allows this recycling to  
23 occur, and that is because there can be no land  
24 disposal between the point of generation of that  
25 waste and its introduction back into the coke --

1 the coking process.

2 Q. Would it make any difference if the coal with  
3 the hazardous waste -- that the hazardous waste was  
4 put in, was ultimately placed into a coke oven?

5 A. Could you repeat that?

6 Q. Would it make any difference if the coal the  
7 hazardous waste was put in was ultimately placed  
8 into a coke oven?

9 A. No. The problem is that there was land  
10 disposal between the point of generation and the  
11 time that the material was introduced into the  
12 coking process. It's that critical time period  
13 where the problem occurred.

14 Q. Okay. Now point of clarification. Going back  
15 to the 18 samples taken in December of 2009, do you  
16 recall that?

17 A. Yes.

18 Q. All right. Do you know at all if -- how many  
19 of those samples were taken outside of the two  
20 tanks?

21 A. I believe there were four samples. There were  
22 four samples taken. Numbers 15, 16, 17 and 18 were  
23 taken outside the tanks.

24 Q. All right. And how many of those exceed the  
25 regulatory level for benzene?



1 A. All four of them did.

2 MR. PIAGGIONE: Okay. I have no further  
3 questions of this witness.

4 THE COURT: Okay, Mr. Piaggione.

5 Mr. Linsin.

6 MR. LINSIN: May I proceed, your Honor?

7 THE COURT: Yes.

8 CROSS-EXAMINATION BY MR. LINSIN:

9 Q. Good afternoon, Mr. Flax.

10 A. Good afternoon, sir.

11 Q. My name is Greg Linsin. I represent the  
12 Tonawanda Coke Corporation. I'd like to ask you a  
13 few preliminary questions about your preparation to  
14 testify here in this trial today.

15 You testified on direct examination I believe  
16 that you reviewed the EPA file regarding this  
17 matter, is that correct?

18 A. Yes.

19 Q. Could you describe, please, for the members of  
20 the jury what -- what was in that EPA file about  
21 this case?

22 A. There were inspection reports.

23 Q. Can you be specific about which inspections?

24 A. Sure. In the EPA file there were inspection  
25 reports from June of 2009 and September of 2009

1       that were performed by one of my staff members,  
2       Lenny Grossman. There was also a sampling  
3       report -- two sampling reports from September 2009  
4       and December 2009 when -- when samples were taken  
5       and analytical results obtained --

6               THE COURT: Slow down a little bit.

7               THE WITNESS: Sorry. Sorry, your Honor.  
8       Where samples were taken around the two tanks.

9       BY MR. LINSIN:

10      Q. You testified -- I'm sorry, that  
11      Mr. Grossman -- you were supervising Mr. Grossman  
12      back in 2009, correct?

13      A. Yes, I was.

14      Q. And you testified, if I heard you correctly,  
15      that he prepared an investigative report after his  
16      visit to the facility in June of 2009, right?

17      A. Correct.

18      Q. And you reviewed that report, right?

19      A. Yes, I did.

20      Q. Did I also hear you to say that he prepared an  
21      investigative report following his visit to the  
22      facility in September of 2009?

23      A. That's correct.

24      Q. All right. And do you know where that report  
25      is now?

1 A. It should be in the files.

2 Q. In whose files?

3 A. I'm sure it's in EPA's files.

4 Q. Do you know when that document was prepared?

5 A. Generally it had to be shortly after he  
6 performed the inspection.

7 Q. All right. And then a report following the  
8 sampling inspection -- what was the third report  
9 you referenced?

10 A. There was a December -- well, there was a  
11 September sampling report, and also a December  
12 sampling report.

13 Q. And the December sampling report was actually a  
14 sampling report conducted in connection with the  
15 execution of a federal criminal search warrant,  
16 correct?

17 A. Correct.

18 Q. All right. And I also believe I heard you to  
19 testify that you reviewed portions of the  
20 investigative file -- I'm sorry, the regulatory  
21 file from the Department of Environmental  
22 Conservation for the State of New York, correct?

23 A. That is correct.

24 Q. Would you explain what portions of that file  
25 you reviewed?

1 A. I just -- I looked at the three old inspection  
2 reports.

3 Q. Which ones?

4 A. They dated back several years. I can't tell  
5 exactly which ones. They were done by three  
6 different inspectors. Actually two different  
7 inspectors.

8 Q. Do you remember their names?

9 A. Sure. One was Tom Corbett. The other name  
10 I -- and I looked at two of Tom Corbett's  
11 inspection reports. The other one the name escapes  
12 me right now.

13 Q. Do you know what year it was from?

14 A. They were between I think 2006 and 2009 I  
15 believe.

16 Q. Did you review any RCRA compliance inspection  
17 reports conducted by Bureau of Hazardous Waste  
18 Operations for DEC prior to 2006?

19 A. I don't believe I did, but I might have,  
20 because I'm not sure of the dates on the reports  
21 that I looked at.

22 Q. Isn't it important -- I thought I heard you  
23 testify that it is important before conducting an  
24 inspection or developing opinions about a  
25 compliance situation with regard to a waste

1 generator, that you understand the compliance  
2 history and regulatory history of that facility,  
3 isn't that correct?

4 A. Yes, it is.

5 Q. Did you review all of the RCRA compliance  
6 inspection reports for this facility, sir?

7 A. No, I didn't.

8 Q. Did you review any of the statements --  
9 investigative statements taken with respect to the  
10 employees of the Tonawanda Coke Corporation?

11 A. No, I did not.

12 Q. Did you review any of the grand jury testimony  
13 of the -- of those employees?

14 A. No, I did.

15 Q. Have you reviewed any of the trial testimony of  
16 the Tonawanda Coke employees who testified in this  
17 trial about the activities related to the  
18 management of K087 at Tonawanda Coke?

19 A. No, I have not.

20 Q. Did you review any of the trial testimony of  
21 the Tonawanda Coke employees regarding the  
22 management of the materials in the Barrett tanks?

23 A. No, sir.

24 Q. Did you review any photographs from the  
25 facility?

1 A. Yes, I have.

2 Q. Which ones?

3 A. I reviewed photographs that were taken during  
4 the sampling inspections and the compliance  
5 inspections.

6 Q. And these would be the two sampling inspections  
7 in 2009?

8 A. Yes.

9 Q. And which compliance inspection?

10 A. I believe the second inspection that -- no, it  
11 may just be from the sampling inspections.

12 Q. September '09 and --

13 A. And December.

14 Q. Okay. Did you talk at all with the DEC RCRA  
15 compliance inspectors who had visited this facility  
16 prior to 2009?

17 A. Prior to 2009?

18 Q. Yes.

19 A. About this facility?

20 Q. Yes, sir.

21 A. No.

22 Q. Subsequent to 2009 did you talk to any of those  
23 individuals?

24 A. Yes. I communicated with Tom Corbett.

25 Q. Did you speak with Mr. Fisher?

1 A. No.

2 Q. Did you speak with Mr. Wozniak?

3 A. No.

4 Q. Do you know -- do you know when the first RCRA  
5 compliance inspection regarding this facility was  
6 conducted by DEC?

7 A. No, I do not.

8 Q. Are you aware, Mr. Flax, that there is a charge  
9 in this indictment regarding allegations concerning  
10 the illegal storage -- the unpermitted storage of  
11 hazardous waste at Tonawanda Coke?

12 A. Yes, I am.

13 Q. Do you know what time period that charge  
14 relates to?

15 A. It relates to the time period following the  
16 release of the hazardous waste from the tank on to  
17 the ground surface.

18 Q. And when do you understand -- is that what you  
19 understand the charge to include?

20 A. I believe it occurred between -- that storage  
21 occurred between 2008 and 2009.

22 Q. And so your understanding is that it relates to  
23 the release of material from one of the tanks, is  
24 that correct?

25 A. Yes.

1 Q. And what material is alleged to have been  
2 illegally stored, do you know?

3 A. Hazardous waste with characteristic D018 for  
4 benzene.

5 Q. From what location?

6 A. From one of the Barrett tanks I believe they  
7 call it.

8 Q. So it's your understanding that the storage  
9 count relates to the material inside the Barrett  
10 tanks?

11 A. Not inside. The material that was released  
12 onto the ground and left there for a year.

13 Q. I see. Let me make sure I understand what  
14 you're saying. Your understanding is that the  
15 storage count in this case relates to the material  
16 that was released from one of the Barrett tanks and  
17 then left on the ground, is that correct?

18 MR. PIAGGIONE: Objection, your Honor.  
19 I'm not sure I understand the relevance of what he  
20 understands were the legal charges in this  
21 particular case.

22 THE COURT: Well, how is that relevant?

23 MR. LINSIN: I understand -- your Honor, I  
24 think it goes to the heart of relevance.  
25 Understanding -- for a witness to express -- an



1 expert witness to express an opinion about factual  
2 circumstances, it is critical that that witness  
3 understand what those factual circumstances are.

4 THE COURT: I think that's right as far as  
5 the expert witness testimony is concerned. There  
6 is a difference between a nonexpert and expert for  
7 purposes of this line of questioning.

8 MR. PIAGGIONE: However, your Honor, we  
9 did give him hypotheticals that were not exactly  
10 what was charged, and his testimony was --

11 THE COURT: Well then, I shouldn't have  
12 allowed it probably. Right?

13 MR. PIAGGIONE: Excuse me. I stand  
14 corrected. We gave it in reference to the facts in  
15 the case, however we didn't reference it to the  
16 counts in the case.

17 THE COURT: Okay. I don't think that -- I  
18 mean certainly you had opened the door by doing it  
19 that way. And I'll permit this examination.  
20 Overruled.

21 MR. LINSIN: Thank you, your Honor.

22 BY MR. LINSIN:

23 Q. Now, the questions I was asking, Mr. Flax, were  
24 related to the one storage charge in this  
25 indictment. And if I understand your testimony

1       correctly, it's your understanding that that one  
2       storage charge relates to material that was  
3       released from one of these Barrett tanks and then  
4       left on the ground without being cleaned up, is  
5       that correct?

6       A.   Correct.

7       Q.   And that the opinions you've expressed today  
8       relate to your view about those factual  
9       circumstances, is that correct?

10      A.   Yes.

11      Q.   Now, there are two RCRA disposal counts,  
12      unpermitted disposal counts, is that your  
13      understanding?

14      A.   I'm certain of one RCRA disposal count that  
15      involves the mixing of the waste from the tanks  
16      with the coal on the grounds.

17      Q.   All right. Is that the only RCRA disposal  
18      count you're aware of, sir?

19      A.   Yes.

20      Q.   All right. And the opinions you're offering  
21      today are limited to that one RCRA disposal count  
22      that you just explained?

23      A.   Yes.

24      Q.   And your understanding is that it relates to  
25      the removal of some of the material from inside one

1 of the tanks and then the placement of that  
2 material on a coal pile, is that correct?

3 A. It's the placement of material from inside or  
4 outside of the tank on to the coal pile on the  
5 grounds.

6 Q. Okay. And the opinions you're offering here  
7 don't relate to any other factual circumstances  
8 that occurred at the Tonawanda Coke plant, correct?

9 A. Correct. Only to things I've been questioned  
10 on.

11 Q. All right. Now, you testified on direct, sir,  
12 that you have testified twice before as a RCRA  
13 expert, correct?

14 A. Correct.

15 Q. And in those cases, Mr. Flax, were you  
16 testifying as someone who had supervised the  
17 original investigation in those cases?

18 A. No, I was not.

19 Q. But you are here today, aren't you?

20 A. Yes.

21 Q. I want to go back a little bit earlier in 2009  
22 if we can for a moment, because at that time you  
23 were the senior enforcement team leader for the  
24 Region 2's Division of Enforcement and Compliance  
25 Assistance, correct?

1 A. Correct.

2 Q. That's in the RCRA compliance branch, right?

3 A. Yes.

4 Q. And in that capacity as the senior enforcement  
5 team leader, were you aware of plans to conduct a  
6 joint compliance inspection at the Tonawanda Coke  
7 facility back in April of 2009?

8 A. I became aware of the plans I believe shortly  
9 after that. I don't believe it was as early as  
10 April that I was aware of it.

11 Q. With whom did you -- did you speak with any of  
12 the Region 2 personnel who participated in that  
13 April 2009 inspection at Tonawanda Coke?

14 A. No.

15 Q. Not at any point?

16 A. I never communicated with any other -- well,  
17 inspection personnel except the person who worked  
18 for me, Leonard Grossman.

19 Q. All right. But I'm talking about -- at this  
20 point I'm talking about the air inspectors.

21 A. No.

22 Q. All right. So you didn't speak to Harish  
23 Patel?

24 A. No.

25 Q. Or Mozey Ghaffari?

1 A. No.

2 Q. Or Richard Kan?

3 A. No, sir.

4 Q. All right. When did you first become involved  
5 in the plans for Mr. Grossman to conduct or  
6 participate in a RCRA compliance inspection at the  
7 Tonawanda Coke facility?

8 A. Shortly before he conducted the inspection.

9 Q. And what were the circumstances that led to  
10 your speaking to Mr. Grossman about his  
11 participation in such an inspection?

12 A. Well, basically we were going through certain  
13 activities that he had to perform and obligations  
14 he had. And it came up in discussion that he was  
15 going to go up and inspect the Tonawanda Coke  
16 facility, so he wouldn't be able to do something  
17 else. That's when it started.

18 Q. And what were those allegations that  
19 Mr. Grossman had?

20 A. At what time, sir?

21 Q. Prior to the June 2009 inspection. I thought I  
22 just heard you say that he told you that he was  
23 going to go up to investigate certain allegations  
24 he had.

25 A. Not certain allegations, to determine the

1 compliance at the facility.

2 Q. What prompted him to make the decision that he  
3 was going to go to Tonawanda Coke?

4 A. He was told by our management to go.

5 Q. And who was that?

6 A. George Meyer.

7 Q. And what is his position?

8 A. He's a branch chief. He was my supervisor at  
9 the time.

10 Q. And why did Mr. Meyer tell Mr. Grossman to go  
11 inspect the Tonawanda Coke facility?

12 A. I believe as a result of the air inspections,  
13 information had come to the region that there could  
14 be problems with other environmental laws. So they  
15 made a decision that Leonard would go up and  
16 inspect the facility.

17 Q. And do you know what that information was?

18 A. No, sir, I do not.

19 Q. So prior to Mr. Grossman going out to the  
20 Tonawanda Coke facility, you didn't have any  
21 understanding about what these potential RCRA  
22 compliance issues were?

23 A. No, sir.

24 Q. Had you received any written reports from  
25 anyone?

1 A. No, before -- when Leonard went out, I hadn't  
2 reviewed any DEC reports or anything, no.

3 Q. You just testified that you spoke to  
4 Mr. Grossman about his going out to the Tonawanda  
5 Coke facility. Did you speak with him about his  
6 plans to prepare for that inspection?

7 A. The only thing I told him at the time was that  
8 I knew it was a messy operation, because I had a  
9 little familiarity with the old Bethlehem Steel  
10 coking operation. So I told him to be prepared for  
11 that.

12 Q. You had a little familiarity with the Bethlehem  
13 Steel Corporation?

14 A. Yes.

15 Q. What connection does Bethlehem Steel have with  
16 Tonawanda Coke?

17 A. Nothing.

18 Q. So what do you mean when you say you knew it  
19 was a messy operation, what does that mean?

20 A. In 1989 --

21 Q. Excuse me -- could I just -- for everyone's  
22 sake, I understand you want us to hear your  
23 answers. If you could just stay back a little bit  
24 from the microphone.

25 A. Sure. I apologize.

1 Q. It's easier for us to understand you.

2 A. Sure. 1998 I was the corrective action project  
3 manager for the Bethlehem Steel Lackawanna plant.  
4 At that time there were very few activities going  
5 on --

6 THE COURT: Slow down a little bit.

7 THE WITNESS: Sorry, sir. At that time  
8 there were very few activities ongoing. They were  
9 conducting galvanizing operations and specialty  
10 metals, and the only other thing they were doing  
11 was performing coking operations. So during my  
12 site visits up there, I would go by the coke ovens.  
13 I just wanted to let him know it was a little bit  
14 of a messy operation, and wear some protective  
15 clothing. And that was the extent of my  
16 discussions with him about his planned inspection  
17 of Tonawanda Coke prior to him going up there.

18 BY MR. LINSIN:

19 Q. Okay. So you advised Mr. Grossman to wear some  
20 protective clothing when he visited Tonawanda Coke.

21 A. Some boots, sure.

22 Q. Because you had had some experiences with  
23 another coking facility?

24 A. Yes.

25 Q. All right. How many coking facilities have you



1 visited in your career, sir?

2 A. One.

3 Q. Is that the one you just testified about?

4 A. Yes, it is.

5 Q. How many times were you there?

6 A. Maybe a dozen times.

7 Q. And for what purpose?

8 A. Basically to oversee the investigation that was  
9 ongoing for environmental contamination.

10 Q. That is after the facility had closed down?

11 A. It's after they closed down everything but the  
12 three operations I mentioned.

13 Q. So was that a remediation work, sir?

14 A. Yes, sir.

15 Q. So before 2006 you had not been involved in  
16 inspecting an active working coking facility,  
17 correct?

18 A. That's correct.

19 Q. So, getting back to your discussion with  
20 Mr. Grossman before he went to this -- went to  
21 visit Tonawanda Coke in 2009, did you instruct  
22 Mr. Grossman to review the DEC regulatory file for  
23 that facility before he inspected the plant?

24 A. No, I did not.

25 Q. That was a mistake, wasn't it?

1 A. I don't know if it was a mistake.

2 Q. Well, you testified on direct, sir, that you  
3 took courses in how to conduct RCRA inspections.

4 A. Correct.

5 Q. You have taught others how to conduct RCRA  
6 compliance inspections, correct?

7 A. Correct.

8 Q. Wasn't it part of the course you took and isn't  
9 it part of the course you teach that a RCRA  
10 compliance inspector should understand the  
11 regulatory background of the facility before he or  
12 she goes out to conduct a compliance inspection?

13 A. Absolutely.

14 Q. All right. So I ask my question again. It was  
15 a mistake that you didn't ask Mr. Grossman or  
16 direct Mr. Grossman to review the regulatory  
17 compliance history of the Tonawanda Coke plant  
18 before he went to visit it in June of 2009?

19 A. No, sir.

20 Q. Wasn't a mistake?

21 A. No, sir, because I'm pretty well assured he  
22 would have done it without me asking him.

23 Q. And yet you didn't do it before you came op  
24 here to testify, is that correct?

25 A. Please ask the whole question again.

1 Q. You have not reviewed the entire regulatory  
2 file for the Tonawanda Coke facility from the DEC  
3 before you came on here to testify.

4 A. No, I did not.

5 Q. How long have you known, sir, that you were  
6 going to be called here to testify as an expert  
7 witness?

8 A. About a year, more than a year.

9 Q. You received, I believe you said, a report from  
10 Mr. Grossman following his inspection in June  
11 of 2009 at the Tonawanda Coke plant, right?

12 A. Yes.

13 Q. Did you speak to Mr. Grossman about the visit  
14 as well?

15 A. Yes, I did.

16 Q. Did he create any notes during the course of  
17 that inspection?

18 A. Yes, he did.

19 Q. And did you review those?

20 A. At the time. At the time I think I glanced at  
21 them, yes.

22 Q. What did Mr. Grossman tell you about what  
23 happened at that inspection?

24 A. He told me that he and Tom Corbett went to the  
25 area of the Barrett tanks and looked over the area

1 where the material had been discharged. He told me  
2 he asked Mr. Kamholz how they mix the waste from  
3 the tank with coal to recycle it into the coke  
4 ovens. And he told me what the response was.

5 Q. All right. Did he tell you in June -- well,  
6 when was this conversation you had with  
7 Mr. Grossman? Was it still in June, or had it  
8 moved to July?

9 A. It could have been June or July. I don't  
10 remember.

11 Q. Did he tell you that Mr. Kamholz had explained  
12 to the inspectors that they were planning, planning  
13 to do the removal and mixing that you just  
14 testified about?

15 A. Yes, I believe so.

16 Q. So you knew this was something that was  
17 scheduled to happen, correct?

18 A. Yes.

19 Q. Did you have concerns about -- at that point  
20 about the correctness or propriety of that activity  
21 that you've just described?

22 A. Not at that point, because we were in the  
23 process of gathering information that indicated  
24 that there were problems there that we would have  
25 to address through some mechanism.

1 Q. Well, I thought I heard you to just testify  
2 that you were told by Mr. Grossman late June  
3 of 2009 that the facility was planning on taking  
4 material out one of the Barrett tanks and placing  
5 it on the coal pile, correct?

6 MR. PIAGGIONE: Objection, your Honor.  
7 This is hearsay. He's talking about statements  
8 that -- he explaining statements made out of court  
9 to this witness.

10 THE COURT: Well, is there an exception?

11 MR. LINSIN: Your Honor, I'm trying to  
12 explore this witness's knowledge and the basis for  
13 his opinions. Experts can consider all kinds of  
14 opinions.

15 THE COURT: And it's -- it's not  
16 necessarily offered for the truth of the matter.  
17 It can be with respect to state of mind. It can be  
18 an exception in determining the conduct that this  
19 witness followed. So, I think the exceptions  
20 overwhelm the objection, so I'll overrule the  
21 objection.

22 BY MR. LINSIN:

23 Q. Let me repeat this if I can. When you spoke to  
24 Mr. Grossman after he had visited the plant in June  
25 of 2009, did you understand from him that this

1 facility was planning to remove some of the  
2 material from one of those tanks and place it on a  
3 coal pile?

4 A. We briefly discussed that, yes.

5 Q. All right. And did he also explain to you that  
6 Mr. Kamholz in June of 2009 had described the  
7 material in the tanks as being K087?

8 A. Yes.

9 Q. So you knew at that point back in June of 2009  
10 that material you understood to be K087, that the  
11 facility was planning to remove it from one of  
12 these tanks and place it on a coal pile, correct?

13 A. Correct.

14 Q. And it's your testimony here today that in your  
15 opinion that conduct, just that conduct,  
16 constitutes a violation of the RCRA regulation?

17 A. That's correct.

18 Q. You didn't need anymore information, you didn't  
19 need sampling, that conduct that you heard about  
20 was going to constitute a RCRA violation?

21 A. That's correct, yes.

22 Q. Did you yourself or did you direct Mr. Grossman  
23 to call the facility and say, hey, wait a minute,  
24 we have concerns about what you've just told us  
25 you're planning to do. Did you make that call?

1 A. No.

2 Q. You were involved, you testified, also in the  
3 preparation of a request for information that was  
4 sent to Tonawanda Coke in I believe October of '09,  
5 correct?

6 A. That's correct.

7 Q. And then you were also involved in supporting  
8 the execution of the search warrant at the facility  
9 in December of that year, correct?

10 A. Well, I had some discussions with people who  
11 were involved in this, yes.

12 Q. You actually requested to support that sampling  
13 effort during the search warrant, right?

14 A. Yes.

15 Q. So it's accurate to understand, isn't it,  
16 Mr. Flax, that you had been involved and invested  
17 in this case since at least June of 2009?

18 A. Yes, sir.

19 Q. And that the opinions you're offering here  
20 today, the expert opinions you're offering are in  
21 defense of your actions and the people under your  
22 supervision when you served as the senior  
23 enforcement team leader, correct?

24 A. No. What I'm saying is not in defense of their  
25 actions. What I'm saying is after analyzing the

1 activities that took place at Tonawanda Coke and  
2 their relationship to what is allowed in the  
3 regulations, those are the opinions that I'm  
4 stating.

5 Q. Let me put it a different way. The opinions  
6 you're offering here, sir, are not opinions  
7 regarding the conduct of third parties or other  
8 individuals. You're offering opinions about the  
9 decisions that were made both at Tonawanda Coke,  
10 but also within your office during the 2009 period,  
11 correct?

12 A. I was part of those decisions, yes.

13 Q. What is the purpose of an on-site RCRA  
14 compliance inspection?

15 A. To determine the facility's compliance with  
16 whatever RCRA regulations they're subject to.

17 Q. That is true whether an on-site compliance  
18 inspection is of a large quantity generator or a  
19 small quantity generator, correct?

20 A. That's correct.

21 Q. Are you aware that there were RCRA compliance  
22 inspections of the Tonawanda Coke facility prior to  
23 1990?

24 A. I haven't seen any reports.

25 Q. No, but are you aware that the inspections



1 occurred?

2 A. No, I'm not.

3 Q. Don't you think that information would be  
4 relevant to the development of the opinions you're  
5 expressing here today?

6 A. It's -- it's good to look at for, you know,  
7 just review and context. But, really, when we go  
8 do a compliance inspection, what we see is a  
9 snapshot at the moment of what's going on. And  
10 what we hear from facility personnel about what  
11 they've done in the past and plan to do in the  
12 future, that's more of an idea how they maintain  
13 compliance.

14 Q. Isn't it also true, Mr. Flax, that as a matter  
15 of fundamental fairness to a regulated facility,  
16 that before you go in and begin expressing opinions  
17 about the propriety or impropriety of these  
18 operations you're inspecting, that you have an  
19 understanding of what this facility has been told  
20 previously by regulators?

21 MR. PIAGGIONE: Objection, your Honor.  
22 That's a compound question.

23 THE COURT: I'll permit it. Do you  
24 understand the question?

25 THE WITNESS: Yes.

1 THE COURT: All right. You may answer.

2 Overruled.

3 THE WITNESS: Could you repeat the  
4 question, please?

5 BY MR. LINSIN:

6 Q. Sure. Isn't it also a matter of fundamental  
7 fairness to the regulated facility before you go in  
8 and begin expressing opinions about the propriety  
9 or impropriety of ongoing operations for you to  
10 understand what that facility has been told about  
11 those operations previously by RCRA regulators?

12 A. I don't know if it's a matter of fairness.  
13 Quite often inspectors go to a facility, and if  
14 they don't ask all the right questions, they're not  
15 given all the right information by facility  
16 personnel that would assist them in making the  
17 proper judgment about the activities that are  
18 ongoing at the facility. So I find in a number of  
19 instances facility personnel aren't told exactly  
20 what they should be.

21 Q. Would you like me to repeat the question I  
22 asked you so you could answer it?

23 A. Yes, please.

24 Q. Isn't it a matter of fundamental fairness for a  
25 RCRA compliance inspector to understand what the

1 regulatory history has been for that facility  
2 before he or she goes out to inspect and make  
3 judgments on the propriety of ongoing operations?

4 A. No.

5 Q. You testified on direct, sir, about this issue  
6 of making a hazardous waste determination. Do you  
7 recall that testimony?

8 A. Yes.

9 Q. And if I -- if I recorded it correctly, you  
10 testified about that process both with respect to a  
11 RCRA compliance inspector who is inspecting a  
12 facility, but also then as to what a generator's  
13 obligations are in determining that facility's  
14 hazardous waste, correct?

15 A. Correct.

16 Q. Now, unless I missed it, and it's possible, I  
17 didn't hear you offer any testimony about making a  
18 decision or evaluating whether the material in  
19 question was actually a solid waste.

20 A. Well, for any material to be a hazardous waste,  
21 it first has to be a solid waste.

22 Q. Okay. I didn't hear any testimony in your  
23 direct examination regarding whether a material is  
24 a solid waste. Would you explain, please, what  
25 your analysis is of whether or not a material is a

1 solid waste? How do you go about making that  
2 determination?

3 A. Materials are a solid waste when they are  
4 discarded by being abandoned or disposed, or if  
5 they're recycled, or if they're inherently  
6 waste-like. Those are the major categories, things  
7 that are solid wastes.

8 Q. Well, not all materials that are recycled are  
9 solid wastes, correct?

10 A. No. No. There are -- there are specific  
11 exceptions in the regulations for -- for a lot of  
12 these materials.

13 Q. And one of those -- one of those says, and I  
14 hate to do this, but with my apologies, I'm going  
15 to cite to some or ask you about some of the  
16 provisions in the RCRA regulations, all right?

17 A. Yes, sir.

18 Q. Before I do, is it fair to say that anyone who  
19 practices in the area of RCRA regulation is  
20 required, in order to do their jobs, required to  
21 make frequent reference to the regulations that EPA  
22 has promulgated and that the states have  
23 promulgated as -- in support of that legislation.

24 A. Absolutely. Nobody can memorize the book.

25 Q. And as a matter of fact I heard you testify

1       that -- I think I did, that in evaluating  
2       compliance issues, you yourself and your colleagues  
3       within EPA frequently have to consult with EPA  
4       counsel in order to evaluate whether or not the  
5       conditions you're reviewing or being asked to pass  
6       judgment on are consistent with the regulations or  
7       not, correct?

8       A.   That's correct.

9       Q.   Fair to say -- is it fair to say that these  
10       regulations are somewhat dense?

11       A.   Somewhat.

12       Q.   And also fair to say -- is it also fair to say  
13       that there are a number of terms used in these  
14       regulations that are not actually defined in the  
15       regulations?

16       A.   That's true.

17       Q.   And one of those terms that is not defined in  
18       the RCRA regulations is "land disposal", correct?

19       A.   "Land disposal" is defined in other places.

20       Q.   "Land disposal" is defined where?

21       A.   Defined in guidance, in policy documents that  
22       have been issued by EPA.

23       Q.   But I'm talking about in the regulations  
24       themselves.

25               MR. PIAGGIONE:   Your Honor, I'm going to

1 object to this line of questioning. We were told  
2 we're not supposed to go into the definition of  
3 land disposal, that the Court has provided a  
4 definition of land disposal, and therefore that we  
5 couldn't get into that.

6 THE COURT: No, I don't think that's  
7 right. Overruled. You may proceed.

8 BY MR. LINSIN:

9 Q. All right. Mr. Flax, there's not a definition  
10 of land disposal that specifically applies to this  
11 exclusion you testified on direct examination, is  
12 there? In the regulatory --

13 A. In the regulations, no, there is not.

14 Q. And isn't it also true that there is no  
15 regulatory definition in the regulations for active  
16 management?

17 A. True.

18 Q. Now, I know you've expressed some opinions  
19 about those terms, and we'll explore those. But  
20 even though there are quite a number of regulations  
21 here and quite a number of definitions, those two  
22 terms "land disposal" and "active management" are  
23 not defined, correct?

24 A. That's correct.

25 Q. All right. Now, we were talking about this

1 issue of solid waste, and what is a threshold  
2 requirement to determine whether any material is  
3 even governed by RCRA, correct?

4 A. Correct.

5 Q. Now, one of the provisions of the solid waste  
6 definition provides that materials are not solid  
7 wastes when they are recycled, correct?

8 A. Properly, yes.

9 Q. And that provision in the regulations says that  
10 they can be recycled if they are used or reused as  
11 ingredients in an industrial process to make a  
12 product, provided the materials are not being  
13 reclaimed, correct?

14 A. Correct.

15 Q. Or, or, used or reused as an effective  
16 substitute for a commercial product, correct?

17 A. Correct.

18 Q. Or, return to the original process from which  
19 they were generated without first being reclaimed  
20 or land disposed, correct?

21 A. Correct.

22 Q. All right. So that's one of the regulatory  
23 exceptions -- or several of them, for the  
24 definition of solid waste, correct?

25 A. Correct.

1 Q. Did you analyze that definition in reaching the  
2 opinions you've expressed here today?

3 A. I looked at that. But more than that I went to  
4 the applicable regulations that deal specifically  
5 with coking waste at 261.4.

6 Q. All right. But you can't get to 261.4 because  
7 that deals with a -- the exceptions for hazardous  
8 waste, right?

9 A. Correct.

10 Q. You can't get to 261.4 unless you first work  
11 your way through 261.2, which was what we were just  
12 talking about?

13 A. That's true, but once again, these K wastes are  
14 listed hazardous wastes. Listed hazardous wastes.  
15 I don't have to go through the trail that you're  
16 describing to get to a point to know what the  
17 requirements are for them to be recycled. They're  
18 listed in the regulations.

19 Q. All right. Let me see if I understand that  
20 point correctly. Are you saying, sir, that if you  
21 have a listed hazardous waste such as K087, that it  
22 is not necessary -- in analyzing compliance with  
23 the RCRA regulations, it's not necessary for you to  
24 make reference to 261.2?

25 A. No.



1 Q. All right. Just for the record, all of the  
2 references -- the regulatory references I'm making  
3 are to 40 CFR, Code of Federal Regulations, Section  
4 261.2, and 261.4. Is that what you're referencing,  
5 sir?

6 A. Yes, sir.

7 THE COURT: Are those current regulations?

8 THE WITNESS: They are current.

9 THE COURT: Thank you.

10 BY MR. LINSIN:

11 Q. When did the regulations regarding -- and see  
12 if we can shorthand this a little bit. The waste  
13 materials that exhibit toxicity for benzene, do you  
14 understand those to be identified as D018?

15 A. Yes, sir.

16 Q. All right. And do you know when the  
17 regulations governing D018 became effective?

18 A. I believe -- I believe it was September 1990.

19 Q. Now, let's move to the -- the additional  
20 regulatory reference you were making to 261.4,  
21 okay?

22 A. Okay.

23 Q. And that section overall relates to exceptions,  
24 materials that are not solid waste, is that  
25 correct?

1 A. Correct.

2 Q. And one of those exceptions, and I again  
3 apologize, but it is 261.4(a)(10), is that correct?

4 A. That's correct. Yes.

5 Q. And so the testimony you were offering in your  
6 direct testimony concerns that exception because it  
7 addresses K087 waste, correct?

8 A. Correct.

9 Q. Among others, correct?

10 A. Yes.

11 Q. And that provides that wastes from coking  
12 operations, including K087, that are hazardous only  
13 because they -- I'm sorry. K087 from coking  
14 operations are excluded from the definition of  
15 hazardous waste -- I'm sorry, from the definition  
16 of solid waste when, subsequent to generation these  
17 materials are recycled to coke ovens, to the tar  
18 recovery process as feedstock to produce coal tar,  
19 or mixed with coal prior to the tar's sale or  
20 refining. That's one part of that provision,  
21 correct?

22 A. Correct.

23 Q. And then it says, and this is kind of the  
24 condition we have been talking about, this  
25 exclusion is conditioned on there being no land

1 disposal of the waste from the point they are  
2 generated to the point they are recycled to the  
3 coke ovens or tar recovery refining process or  
4 mixed with coal tar, is that correct?

5 A. Yes, it is.

6 Q. Now, I don't mean to simplify the opinion you  
7 offered. But did I have it correct that you  
8 believe that the remixing process that was engaged  
9 in at Tonawanda Coke constituted land disposal, is  
10 that correct?

11 A. That's correct.

12 Q. And do you know how long that remixing of coal  
13 tar sludge and coal had been going on at Tonawanda  
14 Coke?

15 A. No, I do not.

16 Q. Doesn't matter to you, correct?

17 A. No, it did not. It doesn't matter to me.

18 Q. Do you know whether it had been going on prior  
19 to construction of a concrete pad at that facility?

20 A. It was my understanding it had been going on  
21 for some time.

22 Q. My question was: Do you know whether it had  
23 been going on prior to the construction of a  
24 concrete pad?

25 A. No, I do not.

1 Q. Did you know that this facility had been  
2 determined to be in compliance with the RCRA  
3 regulations by state RCRA inspectors prior to the  
4 construction of the concrete pad?

5 A. I didn't know that was determined prior to the  
6 construction, no.

7 Q. As a matter of fact, the report that  
8 Mr. Grossman provided to you following his  
9 June 2009 inspection had it wrong in that respect,  
10 didn't he?

11 A. I really can't say.

12 Q. You don't remember?

13 A. No, I do not.

14 Q. Do you remember that that report indicated that  
15 the facility used to use the concrete pad in order  
16 to mix the K087 with the coal, but now they've  
17 stopped doing that and they're mixing it on the  
18 coal piles, does that familiar to you?

19 A. It sounds relatively familiar. I think I got  
20 the impression that sometimes they use it, and  
21 sometimes they didn't.

22 Q. But you didn't understand that the facility had  
23 been mixing its K087 waste with the coal in the  
24 coal fields for decades before 2009?

25 A. I knew it had been done since sometime in the

1 past. I didn't know when that happened relative to  
2 the construction of the concrete pad.

3 Q. Okay. Your opinion about this issue of land  
4 disposal -- when you were asked about your opinion,  
5 if I followed you correctly, you were saying  
6 that -- you offered some examples of other  
7 facilities you had inspected, at least I thought  
8 that's what you were saying, that had used a  
9 different method for mixing this K087 waste with  
10 the coal tar, is that correct?

11 A. I have spoken to two facilities. I've never  
12 visited them.

13 Q. All right. When did you speak to those two  
14 facilities?

15 A. It was some time -- I'd have to say probably  
16 maybe a year and a half ago.

17 Q. Subsequent to 2009?

18 A. Yes.

19 Q. If I heard you, you described one facility that  
20 you spoke with that mixes -- that conducts this  
21 mixing on a concrete pad, an 18-inch concrete pad,  
22 correct?

23 A. Yes.

24 Q. And another facility that liquefies the coal  
25 tar sludge and then dribbles or drips it on to the

1 coal, is that correct?

2 A. They spray it on the conveyor that carries the  
3 coal into the coke ovens, yes.

4 Q. All right. And so the coal is on a conveyor  
5 belt, and they're spraying this liquefied coal tar  
6 sludge on the coal as it's moving on a conveyor  
7 belt, right?

8 A. It's an enclosed area, right.

9 Q. Well, as that conveyor belt dumps off its load  
10 of coal and then moves to return back to the start  
11 of the conveyor belt, some of that liquefied coal  
12 tar sludge is going to drip, isn't it?

13 A. I don't know, because I don't have any  
14 specifics of the operation, sir. It was described  
15 to me.

16 Q. Let me ask it this way: Isn't it true that in  
17 all recycling operations under -- that are in  
18 compliance with the RCRA regulations, there is a  
19 recognition that there may well be incidental  
20 spillage or leakage, but that that incidental  
21 spillage or leakage is not going to invalidate the  
22 recycling process?

23 MR. PIAGGIONE: Objection again, your  
24 Honor. That's two questions in one.

25 MR. LINSIN: I'd be happy to ask spillage

1 first and then leakage. I saw them as synonymous,  
2 your Honor, but --

3 THE COURT: All right. Break it down.

4 BY MR. LINSIN:

5 Q. All right. Isn't it true, sir, that in all  
6 recycling operations, EPA -- when evaluating  
7 recycling operations, EPA recognizes that there may  
8 be incidental spillage without voiding or  
9 invalidating the recycling process?

10 A. There may be some incidental or de minimus  
11 spillage in any operation, yes.

12 Q. And there may be some incidental or de minimus  
13 leakage, correct?

14 A. Possible, yes.

15 Q. All right. Without voiding or invalidating the  
16 legitimacy of that recycling process, correct?

17 A. Correct.

18 Q. Isn't it reasonable and fair when interpreting  
19 the RCRA recycling regulations to look to the  
20 intent of the people who conducted that recycling  
21 operation?

22 A. I don't understand that question.

23 Q. Don't you have to look at the big picture?

24 A. Are you talking specifically about Tonawanda  
25 Coke?

1 Q. No, sir. I'm asking you generally now in  
2 assessing a recycling activity for RCRA compliance.

3 A. In all recycling activities we expect that the  
4 people conducting those facilities will minimize  
5 any potential releases to the greatest extent  
6 possible. We're not tolerant of that. We try to  
7 avoid it at all costs, because that's why allow the  
8 recycling, because it minimizes handling of  
9 hazardous waste and it reduces the waste that has  
10 to be handled more and disposed.

11 Q. And part of the big picture of the RCRA statute  
12 itself, isn't it, is to facilitate recycling and  
13 reuse of materials when possible?

14 A. Whenever possible when done properly yes, sir.

15 Q. Because as a matter of fact, if material such  
16 as K087 were not permitted to be recycled back into  
17 the coke ovens, those wastes would have to be  
18 landfilled and sent to a TSD, a treatment, storage,  
19 and disposal facility, correct?

20 A. That is correct.

21 Q. And that is not in anyone's interest, correct?

22 A. Correct.

23 Q. And that is precisely why the exception at  
24 261.4 is in the regulations, correct?

25 A. Correct.



1 Q. You were asked some questions about active  
2 management, correct?

3 A. Yes. Correct.

4 Q. And if I recall your testimony correctly, it  
5 was your opinion that the placement of breeze, coke  
6 breeze on D018 material that might be on the ground  
7 would constitute active management of that  
8 material, is that correct?

9 A. Yes, sir.

10 Q. And did you also say it would constitute  
11 treatment of that material?

12 A. I do believe it's treatment, yes.

13 Q. How do you define treatment under the RCRA  
14 regulation?

15 A. Any process that changes the physical or  
16 chemical nature of a material for any purpose.

17 Q. For any purpose?

18 A. In this instance, let's say for -- say for more  
19 stable storage.

20 Q. There is a regulatory definition of treatment,  
21 correct?

22 A. Yes, there is.

23 Q. And it's actually limited very specifically to  
24 a number of different purposes, correct?

25 A. Yes.

1 Q. All right. So, that definition of treatment  
2 provides that -- it means any method or process  
3 designed to change the physical, chemical, or  
4 biological character of a hazardous waste, correct?

5 A. Correct.

6 Q. So as to number one, neutralize the waste,  
7 right?

8 A. Um-hum.

9 Q. Or recover energy or material resources from  
10 the waste, correct?

11 A. Correct.

12 Q. Now, spreading of breeze wouldn't do either of  
13 those two, correct?

14 A. No.

15 Q. Or to render such waste nonhazardous. That's  
16 not what the purpose of spreading breeze was,  
17 correct.

18 A. Correct.

19 Q. Or less hazardous, right?

20 A. Correct.

21 Q. Or safer to transport, that's not why the  
22 breeze was spread, correct?

23 A. Correct.

24 Q. To store or dispose of, and did I hear you a  
25 moment ago to say you believe that the breeze was

1 spread on top of this material on the ground, the  
2 D018, in order to store it?

3 A. I can't think of any other purpose.

4 Q. You were asked some questions about material  
5 that had existed in land disposal units before the  
6 RCRA regulations -- the RCRA statute came into  
7 effect and the RCRA regulations came into effect,  
8 correct?

9 A. Correct.

10 Q. And you referred to those units as land  
11 disposal units, right?

12 A. Correct.

13 Q. Now, in your experience as a RCRA regulator,  
14 isn't it common -- not just sometimes, but  
15 common -- for industrial facilities to pave over or  
16 cover areas of a plant where waste had been placed  
17 prior to the time that waste was regulated? Isn't  
18 that common, sir?

19 A. I don't know if it's all that common. But  
20 that's usually done after the material is removed  
21 and the unit is closed, then usually they pave it  
22 over.

23 Q. But your testimony is that as far as you know,  
24 that only happens, this paving over --

25 A. No.

1 Q. -- only happens after the material is removed?

2 A. No. But I'm not aware of any specific  
3 incidents where it's done otherwise. And I'm not  
4 saying it may not have been done. I'm just not  
5 aware.

6 Q. So you're not aware?

7 A. Yes.

8 Q. By the way, are you familiar or do you know  
9 personally Marcia Williams?

10 A. No, but I've heard her name.

11 Q. Did you know her when she was the head of EPA's  
12 Office of Solid Waste in D.C.?

13 A. Not personally, no.

14 Q. Do you respect her opinions on these RCRA  
15 compliance issues?

16 A. When she's correct, yes.

17 THE COURT: That's a pretty good answer in  
18 my humble opinion.

19 MR. LINSIN: I agree. I agree.

20 BY MR. LINSIN:

21 Q. Have you -- have the prosecutors shown you the  
22 summary that was filed in this case of Miss  
23 Williams' opinions on these issues?

24 A. Yes.

25 Q. I'm taking it you disagree with those opinions?

1 A. Some of them, yes.

2 Q. And if I hear you correctly, you're saying that  
3 you're not aware of situations where industrial  
4 facilities have paved over land disposal units with  
5 the old material still in place?

6 A. No, I'm not, sir. I work in RCRA corrective  
7 action, and usually what we do is we make sure that  
8 those service impoundments -- I'm sorry. We make  
9 sure that those service impoundments or land  
10 disposal units are either clean closed or  
11 remediated before they're paved over, and then, as  
12 you know, deed restrictions are placed on them.

13 Q. Okay. Would it change your opinion to know --  
14 would it change your opinion regarding the  
15 potential assessment of the application of this  
16 breeze to this material out at Tonawanda Coke if  
17 you knew that this practice had occurred at land  
18 disposal units around the country where old  
19 materials remained in place, and they had been  
20 paved over with storage pads or parking lots, would  
21 it change your opinion to know that?

22 A. If the material at Tonawanda Coke had been  
23 paved over, and this was an acceptable and safe  
24 practice, then it might have. But it's my  
25 understanding that that's not what was done.

1 Q. Is it your understanding that the breeze was  
2 spread on this material in order to facilitate the  
3 movement of heavy equipment without disturbing the  
4 material itself?

5 A. That's not my understanding.

6 Q. What's your understanding of why the breeze was  
7 spread there, sir?

8 A. Probably to decrease the --

9 Q. Wait a minute.

10 A. Okay.

11 Q. If you have an explicit understanding, I'd like  
12 you to tell us that, not a "probably". But do you  
13 have, do you know, and if so my question is going  
14 to be where you learned it --

15 A. Then I don't know why specifically the breeze  
16 was applied.

17 Q. Wouldn't you agree that would be an important  
18 piece of information for you to have in order to  
19 evaluate whether or not this complied with RCRA  
20 regulations or constituted active management?

21 A. Why someone did it?

22 Q. Exactly.

23 A. If -- if someone treats a hazardous waste and  
24 that constitutes active management in a unit that  
25 otherwise would be exempt from RCRA, and the

1 purpose of that, the whole idea behind leaving  
2 these units alone is to not handle that waste and  
3 increase the waste management problem, leave it  
4 alone, because we have other authorities that can  
5 deal with those problems should they arise. That's  
6 why we said leave those alone, and if you don't  
7 touch them after November 19th, 1980, you're not  
8 subject to regulation. So it really doesn't matter  
9 why they did it. I need to know the fact that they  
10 did do it.

11 Q. You used a verb at the start of that answer  
12 that is kind of a term of art in RCRA, right? You  
13 went back to treat --

14 A. Yes.

15 Q. -- correct. That's a critical term under RCRA,  
16 correct?

17 A. Yes.

18 Q. And it's that definition we were just talking  
19 about, correct?

20 A. Yes.

21 Q. And as we work through that definition, if I  
22 understood your testimony correctly, the only way  
23 that that term fits with the activity of spreading  
24 breeze on this material is if it was done to  
25 improve the storage of the material, correct?

1 A. It's not the only one, but --

2 Q. Well, I'm sorry. Then I misunderstood your  
3 earlier testimony.

4 A. No, no. I did say storage, because I can't  
5 think of any other reason why they would have done  
6 it.

7 Q. Okay. But I'm not asking you to imagine. I'm  
8 asking if you know why it was done.

9 A. No, I do not.

10 Q. You do not, okay. You testified that in your  
11 view in order to be compliant with this 261.4  
12 exception, that the mixing of the coal tar -- the  
13 K087 material with the coal, had to be done on, I  
14 believe you said, an impervious pad, is that  
15 correct?

16 A. Impermeable surface, yes.

17 Q. Impermeable surface.

18 A. Yes.

19 Q. That term doesn't exist in the regulations  
20 anywhere, does it?

21 A. No.

22 Q. That is your interpretation of the regulations.

23 A. There are discussions in the preambles, there's  
24 several rules that talk about what an impermeable  
25 surface is.



1 Q. The controlling definition for land disposal  
2 that will be applicable to this case does not use  
3 the term impermeable surface, does it?

4 A. No.

5 Q. So that is your term, correct?

6 A. Okay. It's my term, yes.

7 Q. It might be helpful to use an impermeable  
8 surface or impervious surface, but it is not  
9 required under the definition of land management  
10 that governs this case, correct?

11 A. It's not defined, but the purpose of the  
12 exclusion and the allowance to do this recycling is  
13 conditioned on that the material be controlled so  
14 that there are no releases.

15 Q. The condition is based on there being no land  
16 disposal, correct?

17 A. Correct.

18 Q. All right. Now, if I heard your testimony  
19 correctly, you also believe -- I want to move back,  
20 I apologize, move back a moment to this issue of  
21 active management.

22 You also testified that your belief was -- your  
23 opinion is that if material had leaked out of one  
24 of these tanks on to the ground, that that would  
25 constitute active management, is that your opinion?

1 Did I get that correctly?

2 A. No.

3 Q. Okay. So that doesn't constitute active  
4 management?

5 A. No.

6 Q. So is it your opinion that if material leaked  
7 out of the tanks at Tonawanda Coke and remained  
8 there on the ground for a period of time, that that  
9 constituted disposal?

10 A. It constituted storage.

11 Q. It constituted storage.

12 A. Regulated by RCRA, yes.

13 Q. Why is that?

14 A. Because facilities are under an obligation to  
15 minimize releases to the environment, and when  
16 those releases occur, there is some reasonable  
17 expectation that they will be addressed in a  
18 somewhat rapid manner to be cleaned up.

19 Q. If the material that was in the tank initially  
20 had been in the tank before the enactment of the  
21 RCRA regulations, and then it leaked out of the  
22 tank, what converts that to a RCRA regulated  
23 substance?

24 A. The material in the tank or outside the tank?

25 Q. The material that has leaked out of the tank.

1       What converts it to a RCRA-regulated substance?

2               MR. PIAGGIONE:   Objection, your Honor.

3       Can we get a time frame for this?

4               THE COURT:   No, we don't need a time frame  
5       right now.

6               THE WITNESS:   The material in that tank?

7       BY MR. LINSIN:

8       Q.   Sir, let me -- I apologize if my question isn't  
9       clear.

10            If there was material in the tank that was  
11       there before the enactment of the RCRA regulations  
12       and then it leaked out of the tank --

13       A.   Right.

14       Q.   My question is, what converts that material  
15       that has leaked out into a RCRA-regulated  
16       substance?

17       A.   The material in the tank, to begin with, was a  
18       RCRA-regulated substance.   So what we had was a  
19       discharge, a leaking of what was already a  
20       RCRA-regulated substance.

21       Q.   So it's your view, if I hear you correctly,  
22       that if there was material in the tank that existed  
23       in this tank before the RCRA regulations were  
24       enacted --

25       A.   Correct.

1 Q. -- that all of that material, without anything  
2 more, all of that material became subject to RCRA  
3 regulation at the time of the enactment of the  
4 statute, is that correct?

5 A. That's correct. Hazardous waste in a tank at  
6 the time of the RCRA statute's implementation is  
7 regulated hazardous waste. The tank is regulated  
8 unless it is closed or converted to less than 90  
9 days storage.

10 Q. Okay. All right. And so because of that view  
11 that all of this material inside the tank was  
12 governed by RCRA at the time of its enactment,  
13 whether it was actively managed or not, all that  
14 material inside the tank was governed by RCRA at  
15 the time of enactment, then if some of it leaked  
16 out, then that would be storage? Is that correct?

17 A. Storage on the ground, yes.

18 Q. Storage on the ground.

19 A. Yes. That is correct.

20 Q. All right.

21 THE COURT: All right. Let's take 15.

22 MR. LINSIN: Thank you, your Honor.

23 (Jury excused from the courtroom.)

24 THE COURT: Okay. Mr. Flax, you can step  
25 down. Thank you.

1 MR. LINSIN: Thank you.

2 THE COURT: See in you about 15.

3 (Short recess was taken.)

4 (Jury seated.)

5 THE COURT: All right. I like that new  
6 energy level. All right, good to have you back.  
7 Please have a seat. Roll call waived. The  
8 attorneys and parties are back present.

9 Mr. Flax, we're going to have you back on the  
10 stand. You remain under oath. I think we're still  
11 on cross-examination.

12 Okay. Mr. Linsin.

13 MR. LINSIN: Thank you, your Honor. May I  
14 proceed?

15 THE COURT: Certainly.

16 BY MR. LINSIN:

17 Q. Mr. Flax, I just have a couple of more  
18 questions for you, sir. Are you familiar with the  
19 term under RCRA concerning land-based production  
20 units?

21 A. No, I'm not.

22 Q. Do you know whether the mixing of this K087 and  
23 the coal would have been permitted in a land-based  
24 production unit under the RCRA regulations?

25 MR. PIAGGIONE: Objection, your Honor.

1 He's already asked and answered he knows nothing  
2 about that subject.

3 THE COURT: I'll sustain the objection.

4 BY MR. LINSIN:

5 Q. Do you agree with me that it would be important  
6 to your assessment in developing and expressing  
7 your opinions in this matter if you knew that there  
8 were conditions under which the RCRA regulations  
9 permitted the handling and mixing of otherwise  
10 hazardous waste in production units that are in the  
11 land?

12 A. I'm not sure I can answer that question. In  
13 regard to this specific case, I am aware of  
14 allowances whereby waste generated by this facility  
15 are allowed to be recycled. And it is my belief  
16 that all the conditions for that recycling were not  
17 met. But if you're talking about some type of  
18 appurtenance that I'm not aware of, I really can't  
19 respond.

20 Q. Okay. Fair enough. You testified, if I heard  
21 you correctly on direct, that in your judgment and  
22 your opinion that the -- the coal field out at the  
23 Tonawanda Coke facility was the land or ground, if  
24 I heard you correctly, correct?

25 A. Correct.

1 Q. Now, would you agree with me that in a coke  
2 manufacturing facility that the coal is actually a  
3 raw material?

4 A. Yes, I'd agree with that.

5 Q. And a raw material has a particular connotation  
6 with respect to RCRA regulation and application,  
7 correct?

8 A. Raw materials are basically exempt from RCRA  
9 regulation.

10 Q. All right. So the coal in the coal field at  
11 Tonawanda Coke, because it is a raw material -- or  
12 was a raw material, is exempt from RCRA regulation,  
13 correct?

14 A. Correct.

15 Q. Now, is it fair to say, Mr. Flax, that because  
16 there is a parallel enforcement authority between  
17 federal regulators and state regulators under RCRA  
18 that it is important for those two authorities to  
19 carefully coordinate in terms of their application  
20 and enforcement of the RCRA statute and its  
21 regulations?

22 A. And we do that to the greatest extent possible,  
23 yes. The answer is yes.

24 Q. And isn't it important that those RCRA  
25 regulations be applied to regulated facilities in a

1 consistent and predictable manner?

2 A. We try to do that to the greatest extent  
3 possible, yes.

4 MR. LINSIN: Thank you. No further  
5 questions, your Honor.

6 THE COURT: Okay, Mr. Linsin, thank you.  
7 Mr. Personius?

8 MR. PERSONIUS: I have no questions,  
9 Judge.

10 THE COURT: Okay. Thank you.

11 All right. Mr. Piaggione, is there any  
12 redirect?

13 MR. PIAGGIONE: I do have a few.

14 THE COURT: Okay.

15 REDIRECT EXAMINATION BY MR. PIAGGIONE:

16 Q. Mr. Flax, were you involved in the drafting of  
17 the indictment in this case?

18 A. No, I was not.

19 Q. Are you aware that Count 19 of the indictment  
20 involves the unpermitted disposal of K087 waste  
21 from the by-products department of the Tonawanda  
22 Coke by spreading it on to the coal field at the  
23 facility?

24 A. No.

25 Q. So when you testified that you were testifying



1 about -- your expert opinion was limited to the  
2 disposal of hazardous waste, were you talking about  
3 your understanding it was only one count in the  
4 indictment?

5 A. That was my understanding, yes.

6 Q. Okay. You indicated that -- you said on cross  
7 that it was not fair to review all the past RCRA  
8 inspections. Would you want to explain that  
9 please?

10 A. It would be impossible to review every single  
11 document that had ever been generated by both the  
12 state and the EPA on a facility. We do whatever we  
13 can as time permits to prepare for inspections.  
14 Inspectors are taught to prepare to the greatest  
15 extent possible, but time doesn't permit in every  
16 instance.

17 Q. Okay. And with respect to treatment, the  
18 definition of treatment, I'd like to read you the  
19 entire definition of treatment as defined in RCRA  
20 which says, "Any method, technique, or process,  
21 including neutralization designed to change the  
22 physical, chemical, or biological character or  
23 composition of any hazardous waste so as to  
24 neutralize such waste, or so as to render such  
25 waste nonhazardous, safer for transport, amenable

1 for recovery, amenable for storage, or reduced in  
2 volume. Such term includes any activity or  
3 processing designed to change the physical form or  
4 chemical composition of hazardous waste so as to  
5 render it nonhazardous."

6 Now what portion of that are you referring to  
7 when you say mixing with coal breeze constituted  
8 treatment?

9 A. Making it amenable for storage.

10 Q. Okay. And what do you mean "by making it  
11 amenable for storage"?

12 A. Easier to store without problems.

13 Q. Okay. Now, are you aware of the Federal  
14 Register 57 -- Federal Register 27?

15 MR. LINSIN: Objection, your Honor.

16 THE COURT: Grounds?

17 MR. LINSIN: This -- the Court's prior  
18 ruling regarding this specific issue concerning  
19 reference to Federal Register notices or other  
20 publications. We're dealing with defined terms  
21 pursuant to the Court's pretrial ruling.

22 THE COURT: What are you going to do with  
23 this, Mr. Piaggione?

24 MR. PIAGGIONE: I'm just pointing out the  
25 exclusion, your Honor, for RCRA involving the

1 recycling. I'm not going into the definition of  
2 land disposal, which is what we're precluded from  
3 going into. We're talking about the exclusion  
4 itself. They brought up the purpose of the  
5 exclusion, asking about the intent, so this  
6 addresses that issue.

7 THE COURT: Mr. Linsin?

8 MR. LINSIN: Your Honor, my understanding  
9 of the Court's ruling was that this was not going  
10 to be gotten into. If we're going to open this  
11 door, there are a lot of things that come flowing  
12 in.

13 THE COURT: All right. Let me have the  
14 attorneys approach, please.

15 (Side bar discussion held on the record.)

16 THE COURT: All right. You want to go  
17 into the Code of Federal Regulations for the  
18 exceptions?

19 MR. PIAGGIONE: Your Honor --

20 MR. LINSIN: The question related to a  
21 Federal Register notice. This gets into preamble  
22 language -- and I'm looking for portions of the  
23 Court's order.

24 THE COURT: Point that out to me too. I  
25 have it here, but --

1 MR. PIAGGIONE: If I could, heard, your  
2 Honor.

3 THE COURT: So you want to go into the  
4 Federal Register which is what?

5 MR. PIAGGIONE: It discusses the  
6 exclusion. The recycling exclusion in which it  
7 talks about it being not -- being no land disposal,  
8 like the rest of it at this point. And this was  
9 already brought out in part before. Defendants  
10 were bringing up the fact that it was an intent to  
11 dispose was required, and this goes into that  
12 issue. I'm not going into defining what land  
13 disposal is, which is what we are -- which is what  
14 the order defines.

15 THE COURT: All right. Mr. Linsin?

16 MR. LINSIN: The section of the Court's  
17 order that I was referencing, your Honor, appears  
18 in Document 138 at page 18, and it is the end of  
19 the Court's discussion regarding environmental  
20 laws, regulations, and permit conditions. And in  
21 that concluding paragraph the Court stated that the  
22 government's request to preclude defendants from  
23 presenting statutes, regulations, policies, and  
24 other memoranda concerning disputed issues of law  
25 to the jury is granted.

1           The government itself moved to exclude this  
2           kind of material. I expressly avoided using any  
3           such materials with this witness given the Court's  
4           order. And now Mr. Piaggione is seeking to do  
5           something that is directly contrary to at least my  
6           understanding of this direction by the Court.

7           THE COURT: I mean, does this fall within  
8           the disputed issues of law that's referenced in the  
9           final part? Do we have that as --

10          MR. LINSIN: Your Honor --

11          THE COURT: -- at issue here?

12          MR. LINSIN: Of course. The preamble  
13           itself talks about -- this issue of land disposal  
14           is interwoven with this 261.4(a)(10). There is no  
15           pulling it apart. And my point is that if we start  
16           getting into this preamble to talk about what land  
17           disposal means with respect to this particular  
18           exception under the regulations, I don't know why  
19           in the world we would -- how we could stop -- how  
20           we can close that door. And I just -- my  
21           understanding of this provision of the Court's  
22           order was that we were dealing with the text of the  
23           regulations. We're not getting into policies,  
24           memorandum, guidance documents. I thought that was  
25           precisely what the Court was seeking to exclude.

1 THE COURT: What actually is the Federal  
2 Register? Is that the policy statement? What is  
3 that?

4 MR. PIAGGIONE: It's the -- it is the  
5 policy.

6 MR. LINSIN: Your Honor, yes.

7 MR. PIAGGIONE: It is the policy.

8 THE COURT: Then I'm going to preclude it.  
9 Objection sustained.

10 (End of side bar discussion.)

11 BY MR. PIAGGIONE:

12 Q. Just with respect to your conversations or  
13 reports from Lenny Grossman regarding the June 2009  
14 inspection, did Mr. Grossman in his reports  
15 indicate that the defendants told him where the  
16 material around the tanks was going to be recycled?  
17 A. He told me in a discussion that they were going  
18 to recycle it by mixing it into the coal.

19 MR. PIAGGIONE: Okay. I have no further  
20 questions.

21 THE COURT: Okay, Mr. Piaggione.

22 MR. PIAGGIONE: I'm sorry, I just realized  
23 that was a partial answer.

24 THE COURT: I'm sorry?

25 MR. PIAGGIONE: May I have one more

1 question?

2 THE COURT: You're entitled to one change  
3 of mind.

4 MR. PIAGGIONE: Thank you very much.

5 THE COURT: That's it.

6 MR. PIAGGIONE: You've been very kind up  
7 to now.

8 Did he say where the mixture was going to take  
9 place?

10 THE WITNESS: On the coal piles on the  
11 ground.

12 MR. PIAGGIONE: Okay. Thank you, your  
13 Honor.

14 THE COURT: You're welcome.

15 Anything, Mr. Linsin?

16 MR. LINSIN: I have nothing further, your  
17 Honor.

18 THE COURT: Thank you. Mr. Personius?

19 MR. PERSONIUS: Thank you for asking,  
20 Judge. No.

21 THE COURT: Okay. All right. Mr. Flax,  
22 thank you, sir. We appreciate it. Oh, wait a  
23 minute.

24 A JUROR: Am I allowed to --

25 THE COURT: You certainly are. Thank you

1 for reminding me. If there are any written  
2 questions from the jurors, please pass those up to  
3 me. Thank you.

4 Okay. May I see the attorneys, please?

5 (Side bar discussion held on the record.)

6 THE COURT: I'll make copies, and I'll  
7 have you take a look at the question if you need  
8 some time to consider it. But there are  
9 clarification questions from juror number 10 and  
10 that's Miss Flax -- not Miss Flax, Miss Russ, okay.  
11 Here it is. First question: "What is the official  
12 definition of land storage and land disposal?"  
13 Okay. That's the first part of the question.  
14 Question: "In the recycling process, is it  
15 necessary to have a, quote, roof, close quote, over  
16 the mixing process? Also, is it required to have a  
17 concrete pad because you are supposed to recycle on  
18 an impermeable surface?"

19 MR. PIAGGIONE: Your Honor, you can answer  
20 the land disposal definition by simply reading your  
21 definition of the land disposal.

22 MR. LINSIN: These are questions for the  
23 witness.

24 MR. PIAGGIONE: If you want him to testify  
25 what he thinks is land disposal?



1 MR. MANGO: That's tricky because the  
2 Court has obviously defined the term land disposal.

3 MR. LINSIN: And I believe it is valuable  
4 for the jury to understand whether this witness  
5 understands what the controlling definition is  
6 before he took the stand, not have it read to him.

7 THE COURT: Well, if that question were  
8 modified to what is your understanding of the  
9 definition of land storage and land disposal.

10 MR. MANGO: Okay.

11 MR. LINSIN: For the purposes of this  
12 case.

13 THE COURT: For the purposes of this case.

14 MR. LINSIN: Okay.

15 THE COURT: That would work, and then  
16 there would be my instruction that controls in the  
17 end, and that would be referenced in our jury  
18 charge. So I think that works. Okay?

19 MR. PIAGGIONE: Yes.

20 MR. PERSONIUS: Yes.

21 THE COURT: I'm sorry, I didn't mean to  
22 ignore you.

23 MR. PERSONIUS: This is beyond my --

24 THE COURT: Okay. Now, in the -- this is  
25 the second part. "In the recycling process is it

1       necessary to have a, in quote, roof, close quote,  
2       over the mixing process?" I think that's a good  
3       question personally.

4               MR. LINSIN: I agree. I don't disagree.

5               MR. MANGO: Yeah. It's fair.

6               THE COURT: All right. Next question,  
7       "Also, is it required to have a concrete pad  
8       because you're supposed to recycle on an  
9       impermeable surface?" Good question I think.

10              MR. LINSIN: Yes.

11              MR. MANGO: Yes.

12              THE COURT: All right. So let's do those  
13       three, and then we'll come back for the other  
14       question. We'll discuss it. Okay? Fair enough?

15              MR. LINSIN: Sure.

16              THE COURT: Okay. Let me just do it in  
17       segments. Okay.

18              (End of side bar discussion.)

19              THE COURT: Okay. Thank you, ladies and  
20       gentlemen.

21              Mr. Flax, I'm going to ask you three questions,  
22       okay, and ask you to answer these to the best of  
23       your ability. Okay?

24              THE WITNESS: Okay.

25              THE COURT: First question, what is the

1 definition of land storage and land disposal as you  
2 understand them for purposes of this case? Start  
3 with land storage, please.

4 THE WITNESS: There is no definition for  
5 land storage, and there is no definition other than  
6 that defined by the Court for land disposal.

7 I think this question arises, if I may, your  
8 Honor, from my proposition that the discharge from  
9 the tank --

10 MR. LINSIN: Your Honor --

11 THE COURT: You've got to stop there,  
12 Mr. Flax.

13 THE WITNESS: Okay.

14 THE COURT: Okay.

15 THE WITNESS: Sorry.

16 THE COURT: All right. So your answer is,  
17 in short, for both land storage and land disposal  
18 is what? For purposes of this case and your  
19 understanding.

20 THE WITNESS: For purposes of this case  
21 the Court has defined land disposal as any  
22 placement on or into the ground any release on  
23 to -- on to the -- or into the ground basically.  
24 There is no definition for land storage in the  
25 regulations or that has been defined by the Court.

1           THE COURT: Okay. And I will give you,  
2 ladies and gentlemen, a definition with respect to  
3 land disposal.

4           But what is your understanding of land storage?  
5 Tell us your understanding of those terms.

6           THE WITNESS: Land storage simply would be  
7 defined as any temporary placement and storage of  
8 material on the ground. As opposed to land  
9 disposal, which is a complete abandonment of that  
10 material.

11           THE COURT: Okay. We're going to stop you  
12 right there, and the attorneys may want to  
13 follow-up in short order.

14           Your second question is this: In the recycling  
15 process is it necessary to have a, quote, roof  
16 unquote, close quote, over the mixing process?

17           THE WITNESS: It is not necessary, no.

18           THE COURT: Okay. If there is a roof,  
19 does that trigger a different approach to the  
20 analysis that you testified to?

21           THE WITNESS: I'm not sure of the  
22 question, your Honor.

23           THE COURT: Okay. It's probably not a  
24 good question. But if a roof is not necessary, but  
25 there is a roof, does that affect your approach to

1 compliance with the regulations?

2 THE WITNESS: A roof over the concrete  
3 pad?

4 THE COURT: Yes.

5 THE WITNESS: Roof over a concrete pad,  
6 although it's not necessary, it's advisable. The  
7 main purposes of the concrete pad is to prevent  
8 releases into the environment as long as that  
9 concrete pad is sufficient to contain any of those  
10 wastes and manage any potential runoff from those  
11 wastes. A roof is not necessary. However, a roof,  
12 of course, would --

13 THE COURT: Slow down. Slow down, please.

14 THE WITNESS: A roof, of course, would  
15 prevent precipitation from contacting the waste on  
16 the pad and decrease the potential for there to be  
17 runoff from that material.

18 THE COURT: Third question: Is it  
19 required to have a concrete pad because you are  
20 supposed to recycle on an impermeable surface?

21 THE WITNESS: If you could find a good  
22 substitute for a sizable concrete pad with sides  
23 high enough to contain all the material and manage  
24 any potential runoff, that would probably be  
25 acceptable.

1 THE COURT: Okay. Miss Russ, satisfied  
2 with those questions?

3 A JUROR: Yes. I only had two questions.  
4 That's fine. You asked three.

5 THE COURT: Well, actually there are three  
6 question marks on this slip of paper you sent to  
7 me, so by my count that's three, okay? Maybe a run  
8 on question with two -- okay. All right.

9 That's the first note. I want to talk to the  
10 attorneys separately on the second note. Thank you  
11 very much.

12 (Side bar discussion held on the record.)

13 THE COURT: Okay. "If waste is in storage  
14 at a plant and was put there by a past owner, is  
15 the current plant owner responsible for that waste?  
16 That is, the contents, the removal, the recycling,  
17 et cetera?"

18 MR. PIAGGIONE: Your Honor, just to  
19 clarify that question, so this witness would  
20 understand it in terms of RCRA, the question is if  
21 material was being -- being stored that was -- was  
22 present on the property before this property owner  
23 took over, is that subject RCRA. I think that's  
24 what he's trying to say there. I'm not quite clear  
25 if it's going to come across to the witness.

1 MR. LINSIN: I thought I understood the  
2 question from the juror -- could I inquire, your  
3 Honor, which juror has asked that question?

4 THE COURT: Yes, it's Mr. McDonnell. He's  
5 number nine.

6 MR. PIAGGIONE: Can we read the question  
7 again, your Honor?

8 THE COURT: Let me get Mr. Linsin's --

9 MR. LINSIN: I thought I had understood  
10 the question as the Court read it -- maybe a  
11 re-reading would help me understand Mr. Piaggione's  
12 point, but I don't right now.

13 THE COURT: It gets a little complicated  
14 with the add-on portion I think when he asks about  
15 the contents, the removal, and the recycling  
16 referring back to the responsibility for the waste.  
17 But I'm going to read the full question, all right.

18 "If waste is in storage at a plant that was put  
19 there by the past owner" --

20 MR. PIAGGIONE: Is that the plant or the  
21 waste?

22 THE COURT: It's the waste.

23 MR. PIAGGIONE: Okay.

24 THE COURT: So the waste was put there by  
25 the past owner -- "is the current plant owner

1 responsible for that waste?"

2 MR. PIAGGIONE: Under RCRA.

3 THE COURT: Well, we can talk about that.  
4 Then he goes, "For example, the contents, the  
5 removal, the recycling."

6 MR. LINSIN: The one -- I think it may be  
7 helpful, your Honor, to -- as to the latter part to  
8 clarify is the -- is the owner, current owner  
9 responsible under RCRA with respect to storage,  
10 treatment, or disposal.

11 The one concern I have about the question is  
12 that in the initial clause it uses the word  
13 "storage", and that is a term of art under RCRA.  
14 And I would just ask that the Court neutralize the  
15 question somewhat to just say if there was material  
16 present in a tank.

17 MR. PIAGGIONE: No. That's going to  
18 change the meaning to this witness. He's looking  
19 at it in terms of RCRA.

20 MR. MANGO: In our jury instructions, your  
21 Honor, we have requested the Court give a  
22 definition for storage that comes right out of  
23 RCRA. So it's -- and I'm sure this witness knows  
24 that definition of storage. So I think he's going  
25 to understand that question much better in terms of



1       what the juror is asking.

2               THE COURT: Well, if it were to read if  
3       waste is in storage as defined under RCRA.

4               MR. LINSIN: But see, that's the problem,  
5       your Honor. If you're talking about conduct that  
6       occurred before RCRA was enacted, which is what I  
7       think this question is actually getting to,  
8       describing that conduct in terms of a RCRA concept  
9       I think is mixing -- well, is confusing the issue  
10      rather than clarifying.

11              MR. PIAGGIONE: I don't think so, your  
12      Honor. What it's pointing out is that when the law  
13      takes affect, does prior storage become subject to  
14      RCRA? That's basically what he's saying, so to  
15      say -- to define storage as something other than,  
16      as you said non-RCRA storage, it gets more  
17      confusing.

18              MR. LINSIN: What may be helpful, your  
19      Honor, and I don't have it immediately with me, but  
20      I can get it quickly if it might help the Court.  
21      There is a stipulation on this very point, a  
22      material that had been abandoned in the tanks and  
23      around the tanks.

24              MR. PIAGGIONE: That has nothing to do  
25      with this.

1 MR. MANGO: That's not the question, your  
2 Honor. The question is -- that is being asked  
3 about subsequent activities is --

4 (Interruption by the court reporter.)

5 THE COURT: Okay. Let Mr. Piaggione give  
6 us his view.

7 MR. PIAGGIONE: Okay. Your Honor,  
8 basically the question is if -- if storage -- that  
9 the stipulation does not discuss the issue of  
10 storage. It just simply says the material that's  
11 in the tank was placed there by someone else.  
12 Doesn't get into whether or not Tonawanda Coke was  
13 responsible for storage, and that has nothing to do  
14 with this particular question.

15 The question is here, if I understand it  
16 correctly, is if this material that was present on  
17 site in -- being stored and RCRA comes into effect,  
18 does the company have a responsibility under RCRA  
19 for that material being stored? It's much  
20 different than the stipulation.

21 THE COURT: I mean, Mr. Linsin, you  
22 mentioned that storage is a term of art.

23 MR. LINSIN: It is a term of art.

24 THE COURT: And it is. And it's included  
25 in the question, so we have to presume I think that

1 the juror intended it to be included in the  
2 question.

3 MR. LINSIN: Your Honor, the troubling  
4 aspect of the question is that it uses a RCRA term  
5 with respect to conduct that existed before RCRA.  
6 It is -- it is, as I understood the question,  
7 talking about this material being stored prior to  
8 RCRA. So if material is in storage before RCRA is  
9 enacted, then is the owner responsible. And all  
10 I'm asking is that we neutralize, but still retain  
11 what I think is the essence of the question, if  
12 material is present in a tank prior to enactment of  
13 RCRA, is the subsequent owner responsible under  
14 RCRA for treatment, storage, or disposal?

15 THE COURT: Well, if we crafted it to read  
16 if there was waste at a plant -- if there was waste  
17 at a plant owned by a past owner -- that's  
18 cumbersome. Under RCRA is the current plant owner  
19 responsible for that waste?

20 MR. LINSIN: Is the current plant owner  
21 responsible under RCRA.

22 MR. PIAGGIONE: I don't think that defines  
23 what the conduct is, your Honor. In other words,  
24 if there was a waste in a tank prior to RCRA, is  
25 the present owner responsible?

1 THE COURT: The waste, that is the  
2 contents, the removal, the recycling, et cetera.  
3 So all I did was take the term of art out, right?  
4 Which obviates the concern of Mr. Linsin and then  
5 applies RCRA to the appropriate period.

6 MR. PIAGGIONE: Except, your Honor, the  
7 purpose of that question is to find out when RCRA  
8 takes place. This prior conduct prior to RCRA  
9 becomes subject to -- that's really the purpose of  
10 that question. If you present it that way, this  
11 particular witness is not going to understand the  
12 presence of waste in general. He's going to wonder  
13 where it is, what it is, you know, what it's been  
14 used for. He'll answer that it depends. When  
15 really the purpose of that is to say if it was  
16 being stored in the tank.

17 THE COURT: Well, I think if I can't get  
18 an agreement on it I'm going to tell the juror that  
19 because we can't agree on the essence of the  
20 question, I'm not going to permit this one to be  
21 asked.

22 MR. PIAGGIONE: Your Honor, I'll accept  
23 your -- a question is better than no question if  
24 that helps the jurors. We'll go with whatever your  
25 language is.

1 THE COURT: Okay?

2 MR. PIAGGIONE: Okay.

3 MR. LINSIN: Thank you, your Honor.

4 (End of side bar discussion.)

5 THE COURT: Okay. I have one other  
6 question. I am going to ask it slightly modified  
7 to make it an appropriate question under the rules  
8 that all of us have to comply with.

9 So, Mr. Flax, if you would listen carefully,  
10 please. If waste at a plant was put there by a  
11 past or prior owner, under RCRA is the current  
12 plant owner responsible for that waste, that is,  
13 the contents, the removal, the recycling, et  
14 cetera?

15 THE WITNESS: Yes. It's incumbent on a  
16 facility when they purchase property or when the  
17 permit's on it, that they know what they're  
18 purchasing, so yes.

19 THE COURT: Okay. Okay. Mr. McDonnell,  
20 that's the best we can do with your question.  
21 Thank you though. It was -- the essence, is it  
22 there?

23 A JUROR: Yes.

24 THE COURT: Okay. Okay. I'm going to  
25 start with defense counsel. Any questions in

1 follow-up with Mr. Flax? Mr. Linsin?

2 MR. LINSIN: No, thank you, your Honor.

3 THE COURT: Mr. Personius?

4 MR. PERSONIUS: No, thank you, Judge.

5 THE COURT: Mr. Piaggione?

6 MR. PIAGGIONE: No, your Honor.

7 THE COURT: Okay. Mr. McDonnell, you  
8 stumped the experts. All right. Okay. And, of  
9 course, Miss Russ. Thank you for your questions.

10 Again, you know, it's very heartening to have  
11 your efforts and having you engaged in working  
12 through all of this evidence in this very, very  
13 important case. We appreciate that. I mean,  
14 it's -- you know, it's difficult, we know, for you  
15 to endure what you have to endure to put all of  
16 this information together.

17 But again, as we said from the outset, the  
18 application of your common sense, your  
19 intelligence, your experience, when you get to the  
20 deliberations and you're respecting each other's  
21 views, it will make it happen. You'll have  
22 everything you need to resolve this case by  
23 unanimous verdict. Thank you very much for your  
24 efforts.

25 Mr. Flax, you are excused.

1 THE WITNESS: Thank you, your Honor.

2 THE COURT: I appreciate the questions on  
3 behalf of all of us. And what do we have next?

4 MR. MANGO: Your Honor, we do have a  
5 witness that may take a little while. It may be  
6 appropriate --

7 THE COURT: Is that unusual?

8 MR. MANGO: Par for course.

9 THE COURT: How would you like to go home  
10 early? Good deal? All right. You've been  
11 terrific. I mean that sincerely. We look forward  
12 to seeing you tomorrow. What day is tomorrow?

13 THE JURY: Friday.

14 THE COURT: All right. What time are we  
15 going to see you?

16 THE JURY: 9:30.

17 THE CLERK: Judge, wait. We don't have  
18 any calendar tomorrow.

19 THE COURT: You want to start a little  
20 earlier tomorrow? Be here at 9:00 o'clock. We'll  
21 try to start as promptly around 9, 9:15. But we'll  
22 get started right in that period, okay? Be safe on  
23 the way home and, of course, back here tomorrow.  
24 Thanks.

25 (Jury excused from the courtroom.)

1 THE COURT: Okay. Thank you very much.

2 MR. PIAGGIONE: Your Honor, I just have  
3 one request. In light of the questions, would it  
4 be appropriate for your Honor to read the  
5 definition of storage to the jurors? There is a  
6 definition.

7 MR. LINSIN: Your Honor, I anticipate,  
8 given that there is a storage count in this  
9 indictment, that the definition of storage will be  
10 included in the Court's charge to the jury. I see  
11 no reason to pull that out at this moment, and --

12 THE COURT: I can understand the reason  
13 you're asking, but I think the -- frankly, the  
14 juror was satisfied. And it really is the juror's  
15 question. Okay. So on that basis, I'll look to  
16 including it in the final charge, but for purposes  
17 of this point in the trial, I think not. Because  
18 the question has satisfied the juror.

19 MR. PIAGGIONE: All right. Very good,  
20 your Honor.

21 THE COURT: All right. Thank you  
22 everybody. We'll see you tomorrow at what time?

23 MR. MANGO: 8:45.

24 MR. LINSIN: Thank you, your Honor.

25 \* \* \* \* \*



CERTIFICATION

I certify that the foregoing is a  
Correct transcription of the proceedings  
Recorded by me in this matter.

s/Michelle L. McLaughlin  
Michelle L. McLaughlin, RPR  
Official Reporter  
U.S.D.C., W.D.N.Y.